IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-48

STANLEY SPIEGEL,

Petitioner,

VERSUS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION; THE HONORABLE CHARLES A. MOYE, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[redacted]

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BRIEF OF PETITIONER

The Petitioner, Stanley Spiegel, respectfully prays that a Writ of Certiorari issue to review the June 6, 1978 Order of the United States Court of Appeals for the Fifth Circuit which denied Petitioner's Writ of Mandamus and/or Prohibition.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fifth Circuit issued June 6, 1978, at A-3, denying the Writ of Mandamus and/or Prohibition which is attached hereto. (App. A).

JURISDICTION

The jurisdiction of this appeal is grounded in a June 6, 1978 denial of a Petition for Writ of Mandamus and/or Prohibition by the United States Court of Appeals for the Fifth Circuit. The statutory provision conferring jurisdiction of this appeal is 28 U.S.C. §1651(a).

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A WRIT OF MANDAMUS AND/OR PROHIBITION IS AN APPROPRIATE REMEDY FOR PETITIONER.

II.

WHETHER THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, AND THE HONORABLE CHARLES A. MOYE, JR. HAD JURISDICTION TO IMPOSE SENTENCE ON PETITIONER ON FEBRUARY 9, 1978.

III.

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN ENTERTAINING THE GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE DISTRICT COURT'S ORDER GRANTING PETITIONER A NEW TRIAL, WHICH ABUSE OF DISCRETION IS A USURPATION OF JUDICIAL POWER WHICH SEVERELY PREJUDICED PETITIONER AND DEPRIVED HIM OF THIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

A. WHETHER THE GOVERNMENT'S MOTION FOR RECONSIDERATION WAS IMPROPERLY ACCEPTED BY THE CLERK BECAUSE IT WAS NOT ACCOMPANIED BY A MEMORANDUM OF LAW AS REQUIRED BY LOCAL RULE 91.1, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

B. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN CONSIDERING THE GOVERNMENT'S MOTION FOR RECONSIDERATION BY PERMITTING THE GOVERNMENT TO FILE ITS MEMORANDUM OF LAW IN SUPPORT THEREOF OUT OF TIME AND IN THE FACE OF A COURT ORDER TO FILE ITS MEMORANDUM BY A DATE CERTAIN.

C. WHETHER CONSIDERATION OF THE GOVERNMENT'S MOTION FOR RECONSIDERATION VIOLATED RULE 45(b), FEDERAL RULES OF CRIMINAL PROCEDURE.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person . . . shall be compelled in any criminal case to be . . . deprived of life, liberty or property, without due process of law; . . .

STATEMENT OF THE CASE

1. January 23, 1973: Petitioner was indicted on 33 counts of mail fraud and conspiracy.[1/]

2. June 10, 1974: Petitioner's trial commenced in United States District Court for the Northern District of Georgia, Atlanta Division.

3. August 17, 1974: Petitioner was acquitted of conspiracy but convicted of 30 substantive counts of mail fraud.

4. August 23, 1974: Petitioner filed a Motion for New Trial and a Motion to Enlarge the Time for Filing a Motion for New Trial and Post-Trial Motions.

5. August 26, 1974: The trial court issued an Order granting Petitioner until December 15, 1974[2/] to file Application and Amendment to his Motion for New Trial and for the filing of a Motion for Judgment of Acquittal.

1/ For the Court's convenience, Docket Sheet is attached to this Petition as Appendix "A-1".

2/ The date of the trial transcript was expected to be completed.

6. June 11, 1976: Petitioner filed Amended Motions for New Trial and Judgment of Acquittal.[3/]

7. September 7, 1976: Government filed its Response to Petitioner's Motion for New Trial and Judgment of Acquittal.

8. September 27, 1976: Petitioner filed a Responsive Brief to the Government's Response to his Motions for New Trial and Judgment of Acquittal.

9. February 22-24, 1977: Evidentiary hearings held on Motions for New Trial and Judgment of Acquittal.

10. April 13, 1977: Judge Moye granted a new trial with direction that the case be retried on May 24, 1977 (App. "B").

11. April 20, 1977: Government filed Motion for Reconsideration of Order Granting New Trial (App. "C").

12. May 9, 1977: Government filed Motion to Continue Trial setting for May 24, 1977 (App. "D").

13. May 20, 1977: Petitioner filed Motions to Dismiss Government's Motion for Reconsideration and to Continue the May 24, 1977 trial setting (App. "E" and "E-1").

14. May 26, 1977: Government filed Brief in Support of Motion for Reconsideration.[4/] (App. "F").

3/ The trial transcript was not completed until the end of May, 1976.

4/ No brief was filed with the Motion for Reconsideration submitted on April 20, 1977.

15. June 3, 1977: Government filed Response Opposing Petitioner's Motion to Dismiss the Motion for Reconsideration. (App. "G").

16. June 7, 1977: Petitioner filed Response to Government's Brief in Support of Motion for Reconsideration and Supplemental Response to the Government's Motion for Reconsideration (App. "H").

17. June 8, 1977: Petitioner filed Reply to Government Response Opposing Petitioner's Motion to Dismiss the Motion for Reconsideration and Memorandum of Law in Support thereof (App. "I").

18. June 9, 1977: Court issued an Order Granting the Government's Motion for Reconsideration of the Order Granting New Trial and vacated the Order of April 13, 1977 granting the Motion for New Trial (App. "J").

19. June 10, 1977: Oral re-arguments presented to the Court on the Motions for New Trial.

20. October 26, 1977: Court issued an Order Overruling and Denying Petitioner's Motion for New Trial (App. "K").

21. December 15, 1977: Court issued an Order Denying Petitioner's Motion for Judgment of Acquittal (App. "L").

22. January 13, 1978: Petitioner filed Motion to Dismiss Indictment for Lack of Speedy Retrial (App. "M"); and Motion to Dismiss the Indictment, Alternatively, Motion to Vacate Order, and Motion to Bar Sentencing; Alternatively, Motion to Stay Sentencing (App. "M-1").

23. January 30, 1978: Government filed Response to Defendant's Motion to Dismiss, Alternatively to Vacate Orders, and Motion to Bar Sentencing, Alternatively Motion to Stay Sentencing (App. "N").

24. February 1, 1978: Court issued an Order Denying Defendant's Motion to Dismiss the Indictment, Alternatively, Motion to Stay Sentencing, and an Order Denying Motion to Dismiss Indictment for Lack of Speedy Retrial (App. "O").

25. February 9, 1978: Petitioner sentenced.

26. February 13, 1978: Notice of Appeal filed.

27. February 23, 1978: Petitioner advised the Court that his passport had been surrendered.

28. April 11, 1978: Petition for Writ of Mandamus and/or Prohibition filed with the United States Court of Appeals for the Fifth Circuit.

29. June 6, 1978: Petition for Writ of Mandamus and/or Prohibition denied by the United States Court of Appeals for the Fifth Circuit.

Petitioner respectfully submits the following chronology with respect to the events leading up to the denial of the Petition for Writ of Mandamus and/or Prohibition by the United States Court of Appeals for the Fifth Circuit:

Approximately two years and eight months after the jury convicted the Defendant of 30 substantive counts of mail fraud, while acquitting him of conspiracy, the United States District Court granted him a new trial on April 13, 1977 (App. "B"). The Order stated that the new trial was granted on grounds

relating to the verdict being returned by only eleven jurors. However, the Court added that there were other substantial issues raised which had a tandem or enhancing effect on its decision, citing *United States v. Williams*, 523 F.2d 1203 (1975). The Order further declared the case would be on trial on May 24, 1977 and that it was governed by the Speedy Trial Act. On April 20, 1977, the Government filed a Motion for Reconsideration, complaining that the District Court had failed to articulate the underlying basis for its Order granting the new trial and further protesting that the Court had failed to make sufficient findings of fact and conclusions of law (App. "C"). No Memorandum of Law was filed in support of the Motion for Reconsideration as required by Local Rule 91.1:

> Every motion, in both civil cases and criminal proceedings, when filed *shall* be accompanied by a memorandum of law citing supporting authorities and where allegations of fact are relied upon, affidavits in support thereof. The Clerk *shall not accept* for filing any motion which is not in conformance with this rule. (Emphasis added).

On May 9, 1977, the Government filed a Motion to Continue the Trial Date of May 24, 1977, wherein the Government advised the District Court that should the Court refuse to reconsider the Order Granting the new trial, the Government would appeal. The Government also asserted that the filing of the Motion for Reconsideration on April 20, had, in effect, tolled the Speedy Trial Act provisions found in 18 U.S.C. §3161(e).

On May 20, 1977, Petitioner filed a Motion to Dismiss the Government's Motion for Reconsideration (App. "E"). The Motion to Dismiss restated the results of a May 6, 1977 conference in Chambers where the Court directed the Government to file its brief no later than Monday, May 10. It is also clear

from this Motion that Petitioner had put the Court on notice as early as May 6, that he viewed the Court's April 13, 1977 Order Granting a New Trial as not appealable and, therefore, under the Speedy Trial Act, Petitioner was entitled to a new trial within sixty days of that date. Moreover, at the May 6 in Chambers Conference (which was not reported), the Government presented a motion requesting the Court to declare the April 14 Order as not final, pending its ruling on the Motion for Reconsideration. The Court orally denied the Motion. The May 20 Motion to Dismiss contended that the Government failed to file its brief on Monday, May 10, as ordered, and that as of May 20 the Petitioner still had not been served with the Government's brief. The Court refused to grant the Motion to Dismiss, but the Court did not sign an Order extending the briefing schedule beyond May 10. Moreover, the Government did not submit any motion to extend the time to file the Memorandum of Law in Support of its Motion for Reconsideration.

Also on May 20 Petitioner filed a response to the Government's Motion to Continue the Trial (App. "E"), reiterating his position taken in the Motion to Dismiss the Motion for Reconsideration. On the same day, Petitioner submitted a Response to the Government's Motion for Reconsideration (App. "E-1"), stating that the April 13 Order did sufficiently articulate* the underlying basis for the Court's decision and that, since the issues before the Court had been thoroughly briefed, the Government's Motion should be denied.

Finally, on May 26, having obtained no extensions of time, the Government finally submitted a 40-page brief in support of the Motion for Reconsideration (App. "F").

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* See *United States v. Smith*, 331 U.S. 469, 91 L.Ed. 1610 (1946), holding that such articulation is not required.

On June 3 the Government submitted a Response opposing Petitioner's Motion to Dismiss the Motion for Reconsideration (App. "G"). Although Petitioner's Motion to Dismiss had been filed on May 20 (App. "E"), the Government did not respond until June 3, 1977, fourteen days later, although Local Rule 91.2 requires that responses be filed within ten (10) days (App. P, p. 15). Beginning with Paragraph 15 of its Responses to Petitioner's Motion to Dismiss, the Government endeavored to justify why its brief was not filed until May 26. Although the Government attempted to explain away (App. "G", p. 1374) its failure to timely file its Memorandum of Law in Support of its Motion for Reconsideration, Petitioner's Response (App. "H"), through the Affidavits of Attorneys Edward T. M. Garland and Mark J. Kadish, dispelled any notion that Petitioner's counsel waived any Speedy Trial rights or Local Rule 91.1 rights which may have inured to Petitioner's benefit following the April 13 Order Granting Petitioner a New Trial. Mr. Garland's Affidavit (App. "H", pp. 1406-1407) stated that his April 15 discussion with Assistant United States Attorney Gaffney occurred *before* the Government even filed its Motion for Reconsideration and was of a most general nature. Moreover, the entire discussion between Messrs. Garland and Gaffney was in the context of the Government's position that any new trial would take place *after an appeal by the Government.* Referring to Paragraph 27 of the Government's Response (App. "G"), Mr. Garland stated that he asked Mr. Gaffney during the May 10 conversation when Mr. Gaffney would file his brief. Such a statement cannot be construed as any waiver on the part of Mr. Garland, particularly in view of his further comment that in subsequent conversations with Mr. Gaffney, the latter was warned that the Petitioner would find it necessary to file a Motion to Dismiss the Motion for Reconsideration because Mr. Gaffney was not complying with the District Court's briefing schedule order. Moreover, Mr. Garland stated that he was not informed of any informal or formal extensions of the District Court's Order permitting Mr. Gaffney to file his

brief by May 10, 1977. An examination of the Docket Entry Sheet (App. "A") shows no extension of the May 10, 1977 filing deadline. It is noteworthy that Mr. Gaffney does not dispute that during the May 6 in-Chambers conference, he understood that his brief would be due on May 10, 1977. Moreover, the Affidavit of Attorney Kadish, appearing as Exhibit B to App. "H" at p. 1408, gives his unequivocal response (to the Government's allegations set forth in Paragraphs 17, 18, 19, 20, 21 and 22 of the Government's Response):

> On May 6, 1977, approximately 2 weeks after this telephone call, I met with Mr. Gaffney, Mr. Thompson, and Your Honor in Chambers to discuss that status of the Motion for Reconsideration. On the day prior to this conference, May 5, 1977, I advised Mr. Gaffney by telephone that I had conferred with Mr. Spiegel, and that it was his position, and, therefore, mine as his lawyer, that the 60-day period for retrial was running, that the Defendant Spiegel would not waive any Speedy Trial Act provisions inuring to his benefit. It was my state of mind on May 5 that since Mr. Gaffney had given me no reason for not filing his brief in the ensuing two-week period, April 20 and May 5, 1977, that I could not extend any further professional courtesy vis-a-vis his briefing schedule.
>
> Therefore, at the May 6, 1977 conference, I made it clear to all assembled that I, on behalf of Mr. Spiegel, would take the position that the 60-day period for retrial was running and that the Government needed to file its brief quickly. I further stated that although I was expected to be on trial before Your Honor all of the following week, I would not require any additional time to file a responsive brief since I had taken the position that the 60-day period

for retrial was running. As a result of this conference, Your Honor advised Mr. Gaffney to have his brief completed and filed by May 10, 1977, and he agreed to do so. May 10 was a Tuesday. Your Honor also ordered that the Defendant Spiegel's brief be filed by Friday, May 13, 1977.

On the evening of May 6, 1977, I was hospitalized and ordered not to work for a week by my doctor. However, I had at no time requested an extension of time to file my brief. Thereafter, on several occasions I conferred with Mr. Gaffney about the fact that he had not filed his brief on time and had not obtained an extension of time. I told him in essence that he was at his peril as far as the Speedy Trial Act was concerned.

The Government's brief in support of its Response Opposing Petitioner's Motion to Dismiss the Motion for Reconsideration (App. "G", p. 1384) argues that the District Court had no jurisdiction to act on Petitioner's Amended Motions for New Trial and for Judgment of Acquittal since it failed to extend the time for filing the Amended Motions within the 7-day period provided in Rules 29(c) and 33, Federal Rules of Criminal Procedure. The Docket Entry Sheet (App. "A") shows that the jury returned a verdict on August 17, 1974, a Saturday; and that, on August 23, 1974, within the 7-day period provided by Rules 29 and 33, Petitioner did file both his Motion for New Trial and Motion to Enlarge the Time for Filing a Motion for a New Trial and other Post-Trial Motions. August 23 was a Friday. On August 26, Monday, the Court did extend the time for filing the Amended Motions. 5/

5/ The seventh day and last date on which the Court could act on the extension occurred on Saturday, August 24. Therefore, the extension of time granted on August 26 was a timely extension. See Rule 45(a) F.R.Crim.P.

On June 9, 1977, without issuing a written or oral order specifically denying Petitioner's Motion to Dismiss the Government's Motion for Reconsideration and brief in support thereof, the Trial Court vacated its April 13 New Trial Order, and stated that it would reconsider the entire matter.

Additional and lengthy oral re-argument was presented to the Court on June 10. A significant excerpt of the Court's remarks concerning a Speedy Retrial under the Speedy Trial Act appear in App. "M-1", p. 1455. On October 26, 1977, the Court issued an Order overruling Petitioner's Motion for a New Trial (App. "K"). On December 15, 1977, Judge Moye denied Petitioner's Motion for Judgment of Acquittal (App. "L").

On January 13, 1978, Petitioner filed Motions to Dismiss the Indictment for Lack of Speedy Retrial; and to Dismiss the Indictment, Alternatively to Vacate Orders, and Motion to Bar Sentencing (App. "M" and "M-1" respectively). Petitioner contended that the Speedy Trial Act itself barred a retrial, and, more significantly, that the Court lacked jurisdiction to sentence the Defendant. Petitioner urged the Court to find as a fact that, in the context of this most unusual case, the Court could not grant a new trial, particularly *where no judgment of conviction had been entered*, and then take the new trial away from Petitioner without losing jurisdiction to sentence him. The Government filed a timely Motion for Extension of Time to respond to Petitioner's two Motions to Dismiss and on January 30 filed its responsive pleading (App. "N"). On February 1, the Court denied Petitioner's final two Motions to Dismiss (App. "O") and on February 9, 1978, he was sentenced to a period of incarceration of six and a half years; ordered to surrender his passport; and was released pending appeal on a $20,000.00 surety bond.

A timely Notice of Appeal was filed and the case was docketed with the Fifth Circuit Court of Appeals, with the Appellant's brief due at the end of May, 1978. A Motion for Extension of Time for filing Appellant's Brief has been filed with the United States Court of Appeals for the Fifth Circuit and is now pending in that Court. Said appeal will contain a large number of issues which, in part, were presented to the trial court as part of Petitioner's Motions for New Trial and Judgment of Acquittal. On June 6, 1978, the United States Court of Appeals for the Fifth Circuit denied the Petition for Writ of Mandamus and/or Prohibition.

REASONS FOR GRANTING THE WRIT

Mandamus is an appropriate remedy in this case since there is no other adequate means to attain the relief Petitioner requests. Moreover, the issuance of the Writ in the context of this case is critical to insure that proper supervisory control is maintained over the District Courts so that the situation confronting Petitioner does not recur in subsequent litigation. Affirmative action in this case will also prevent further disruption in the administration of criminal justice in the Fifth Circuit. The exercise of mandamus power is especially appropriate in this case which has already consumed ten weeks of trial time in the Northern District of Georgia, and literally in excess of four years of consideration of Petitioner's post-trial Motions for a New Trial and Judgment of Acquittal. Petitioner, therefore, submits that the facts set forth herein and the legal analysis to be presented below will demonstrate to this Honorable Court that his right to the issuance of the Writ is clear and indisputable.

Review of the denial of the Petition for Writ of Mandamus and/or Prohibition by the Fifth Circuit Court of Appeals is necessary to resolve the critical and novel legal question of

whether the District Court Judge had jurisdiction to grant and then vacate an order for new trial. This question is especially important since there is a lack of federal criminal case precedent in this area. Thus, this case presents a novel and important question which will provide important guidelines for the future resolution of similar cases.

I.

WHETHER A WRIT OF MANDAMUS AND/OR PROHIBITION IS AN APPROPRIATE REMEDY FOR PETITIONER.

Most recently, the United States Supreme Court in *Kerr v. United States District Court for the Northern District of California, et al*, 48 L.Ed.2d 725, 732-733, 96 S.Ct. 2119 (1976), set forth criteria establishing when a Writ of Mandamus is an appropriate remedy:

1. The remedy of mandamus is a drastic one to be invoked only in extraordinary situations. (Citing *Will v. United States*, 389 U.S. 90, 95, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967).

2. The writ has traditionally been used in the Federal courts only to *confine an inferior court to a lawful exercise of its prescribed jurisdiction* or to compel it to exercise its authority when it is its duty to do so (Citing *Will v. United States, supra*, and *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26, 87 L.Ed. 1185, 63 S.Ct. 938 (1943).

3. Only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy. (Citing *Will v. United States, supra*, at 95.)

4. The party seeking issuance of the writ has no other adequate means to attain the relief he desires (Citing *Roche v. Evaporated Milk Association, supra,* at 26.

5. The petitioner has the burden of showing that his right to issuance of the writ is clear and indisputable [Citing *Bankers Life & Casualty Company v. Holland,* 363 U.S. at 384, 98 L.Ed. 106, 74 S.Ct. 145; and *United States v. Duell,* 172 U.S. 576, 582, 43 L.Ed. 559, 19 S.Ct. 286 (1899)].

6. The issuance of the writ is in large part a matter of discretion of the Court to which the petition is addressed [Citing *Schlagenhuf v. Holder,* 379 U.S. 104, 112 n. 8, 13 L.Ed.2d 152, 85 S.Ct. 234 (1964).

Additionally in *LaBuy v. Howes Leather Co.,* 352 U.S. 249, 259-260, 77 S.Ct. 309, 315, 1 L.Ed.2d 290 (1957), the Supreme Court stated:

> We believe that supervisory control of the District Courts by the Courts of Appeal is necessary to proper judicial administration in the federal system.

The Court of Appeals for the Second Circuit took a similar position when it stated in *United States v. Dooling,* 406 F.2d 192, 198-199 (1969):

> But circumstances can arise which present a compelling need for the issuance of mandamus in order to further important countervailing interests. Here we find this need in our responsibility for preventing gross disruption in the administration of

> criminal justice, and we act pursuant to our supervisory power over the district courts.
>
> * * * * *
>
> We are also of the view that the exercise of our mandamus power is especially appropriate in a case which has already taken a grossly disproportionate amount of trial time in the United States judicial district where the delay in reaching criminal cases for trial is the greatest of any district in the country.

The United States Court of Appeals for the Eighth Circuit in *General Motors Corp. v. Lord,* 488 F.2d 1096, 1099 (1973), stated:

> Extraordinary circumstances may be presented where the order under attack exemplifies a novel and important question in need for guidelines for the future resolution of similar cases.

More directly on point, the United States of Appeals for the Third Circuit in *Butcher and Sherrerd v. Welch,* 206 F.2d 259, 261-262, stated that mandamus is an appropriate remedy where the lower court is *without jurisdiction to vacate a judgment.* Finally, in *Will v. United States,* 389 U.S. 90, 19 L.Ed.2d 305, 88 S.Ct. 269, the Supreme Court of the United States held that a mandamus will lie in appropriate cases to correct a lower court's willful disobedience of the procedural rules laid down by the United States Supreme Court.

Petitioner contends that this case does present an extraordinary situation. Moreover, the lack of federal criminal case precedent where a trial judge has granted and then vacated an order for a new trial, coupled with the unusual factual circumstances herein set forth, squarely places this litigation in an extraordinary situation.

Petitioner submits that the District Court's act of sentencing him now presents this Honorable Court with a serious and novel question of whether the District Court usurped its power. This question of lack of jurisdiction to act takes on Constitutional dimensions since the judicial act in question constitutes a taking of the Petitioner's liberty and property without due process of law.

Petitioner could pursue this jurisdictional issue in his direct appeal to the United States Court of Appeals for the Fifth Circuit. However, in the context of what will be an extremely lengthy and complex appeal, involving many issues and many additional months of briefing, the awaiting of the Fifth Circuit Court of Appeals' decision, combined with Petitioner's immediate and real, and continuing loss of reputation and business, leaves Petitioner with no other adequate means to attain the relief he desires except by this petition. Petitioner submits that the facts as already set forth and the legal analysis to be presented below will demonstrate to this Court that his right to the issuance of the Writ is clear and indisputable. Moreover, the issuance of the Writ in the context of this case is critical to insure that proper supervisory control is maintained over the District Courts so that the situation confronting Petitioner does not recur in subsequent litigation. Affirmative action in this case will also prevent further disruption in the administration of criminal justice in the Fifth Circuit. The exercise of mandamus power is especially appropriate in this case which has already consumed ten weeks of trial time in the Northern District of Georgia, and literally in excess of four years of consideration of Petitioner's post-trial Motions for a New Trial and Judgment of Acquittal. This is truly a case to apply the axiom that there must be *some* point where litigation in the lower court is terminated. Thus, this case presents a novel and important question which will provide important guidelines for the future resolution of similar cases. See, e.g., *Schlagenhauf v. Holder, supra;* Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595, 610 (1973).

Therefore, for all the foregoing reasons, Petitioner would respectfully urge this Honorable Court to find that mandamus is an appropriate remedy.

II.

WHETHER THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, AND THE HONORABLE CHARLES A. MOYE, JR. HAD JURISDICTION TO IMPOSE SENTENCE ON FEBRUARY 9, 1978.

Federal Precedent is scarce; however, the Fifth Circuit in *United States v. Spinella*, 506 F.2d 426, 430 (1975), did address itself to this issue although the facts of *Spinella* are clearly distinguishable from the instant case. In *Spinella*, the defendant's motion for new trial was granted after the Court *had entered a judgment of conviction following a jury verdict.* Soon after the second trial had begun, the trial judge vacated the prior order granting a new trial, terminated the second trial, and proceeded to sentence the defendant. The Court vacated Spinelli's sentence and remanded the case the the District Court to enter a judgment of acquittal for Spinelli.

Although *Spinella* is factually distinct since a judgment of conviction had been entered, and his second trial had begun when the trial court vacated its order granting him a new trial, this Court's holding is controlling here:

> Many cases hold that a court of general jurisdiction has the power to vacate an order granting a new trial before the new trial commences *in a civil case* . . . . *We have found no case* however, dealing specifically with the effect of commencing a second trial on an

earlier *criminal conviction.* Jeopardy attaches when a criminal trial commences before the jury . . . . *The order granting the new trial necessarily has the effect of vacating the judgment of conviction rendered in the earlier trial* . . . . It follows, then that the trial court in the present case had no power to revive a judgment of conviction that became a nullity when the defendants were placed in jeopardy in the second trial . . . .

The only question that remains once we have determined that the judgment of conviction obtained at the first trial could not be 'reinstated', is whether Spinella may be tried again for the offenses charged in the first two trials. At 430 (Emphasis added).

Petitioner submits that it is clear and indisputable that the language underlined above should persuade this Court to review denial of the Writ, particularly where the following facts are not in dispute:

1) An unconditional Motion for New Trial was granted.

2) A date certain of May 24, 1977 was set for the second trial to commence.

3) The District Court never entered a judgment of conviction in this case; only the jury verdict was a part of the record when the Judge issued his order granting Petitioner a new trial.

4) The Order granting a new trial is not a final order from which the Government may prosecute on appeal. See cases cited *infra*, p. 27.

The most significant of the undisputed facts is that the trial court *never* entered a judgment of conviction prior to the time the new trial was granted. Therefore, the effect of the unconditional new trial grant was to *render null and void* the jury's guilty verdict. Although Petitioner can find no cases which deal with this precise point, he would urge this Court to conclude that in a criminal case, a trial court cannot reinstate a jury verdict once that verdict has been rendered a nullity by a prior grant of a new trial. At the moment that the jury verdict was dissolved, the District Court necessarily lost its power to revive it. To permit reinstatement, in essence, places the trial judge in the position of thereafter acting as a jury foreman announcing a *new* jury verdict of guilty. This extension of the judicial function is not permitted anywhere in the Federal Rules of Criminal Procedure, by the common law, or in the Constitution of the United States. Petitioner submits that the trial judge cannot even reinstate his own judgment of conviction once there is an unconditional grant of a new trial. However, that issue need not be reached in this case since no judgment of conviction appears in this record.

Several state appellate courts within the Fifth Circuit have rendered opinions favoring Petitioner's position. In *Burton v. State*, 296 So.2d 79 (Fla. App. 1974), the Court was confronted with a situation where, after granting the defendant's motion for new trial on the ground of newly discovered evidence, on the State's petition for rehearing, the trial judge vacated the motion granting the new trial and sentenced the defendant. The District Court of Appeals of Florida held at 80:

> To permit the state to file a motion or petition for rehearing after the court has entered its order granting the motion for new trial presents the *possibility of an endless procedure because presumably*, if such is allowed and the state is successful on its petition for rehearing, defendant may then petition for a

further rehearing and on and on with no finality to the matter. We think the better rule is simply this: *Where defendant has timely moved for a new trial and the matter has been heard upon the merits and thereafter an order entered either granting or denying the motion, absent fraud or clerical error, the court is without authority to entertain or consider a petition for rehearing addressed to such order.* (Emphasis added).

Petitioner submits that this decision should persuade this Court that the Fifth Circuit Court of Appeals should have granted the Writ. It is noteworthy that the *Burton* Court, at 80, announced that it considered this case as one of first impression in their jurisdiction. Other state appellate court cases in accord with *Burton* are: *State v. Lubosky*, 59 R.I. 493, 196 A.395 (1938); *Alexander v. State*, 129 Tex. Cr.R. 500, 89 S.W. 2d 411 (1936); *State v. Bullock*, 269 So.2d 824 (Supreme Court of Louisiana 1972); *United R. Co. v. Superior Court*, 170 Calif. 755, 151 P. 129; *Hahn v. Yackley*, 84 Nev. 49, 436 P.2d 215; *Luke v. Coleman*, 38 Utah 383, 113 P. 1023; *Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 P. 733.

The majority of the cited state court cases recite that the trial court cannot reinstate its "judgment of conviction" once a new trial is granted. Thus, in the instant case, Petitioner's argument should be more persuasive since there was no judgment of conviction in existence when the new trial was granted. All that was in existence was the jury's verdict. Thus, the effect of the Order granting a new trial was to extinguish the verdict. In withdrawing the Order granting a new trial, the Judge did not modify or revitalize a prior judgment of conviction, but resurrected the jury's verdict, something he had no control over in the first place. The notion that a judge has the inherent power under the common law to modify and vacate his own decrees and judgments should not apply to the verdict of the

jury, since the trial judge has no control over that. Thus, when a motion for new trial is granted *prior* to the entry of judgment upon the verdict, the effect of withdrawing the order of a new trial does not revitalize the verdict, since the judge has no control over it and the verdict has become a nullity. In the posture of this case, then, the District Court could not and should not have entertained the Motion for Reconsideration. Moreover, at the moment the trial judge granted the new trial, the only further event that could occur in this case was a new trial. There was no final decision of the Court from which the Government could even seek reconsideration or from which the Government could appeal. Indeed, neither a denial nor granting of a motion for new trial has been held by this and other Circuit Courts of Appeal to be a final appealable order. See *Gilliland v. Lyons*, 278 F.2d 56, 58 (9th Cir. 1960); *Phillips v. Negley*, 117 U.S. 65, 6 S.Ct. 901, 29 L.Ed. 1013 (1886); *Frank Mercantile Corp., et al v. Prudential Ins. Co. of America*, 115 F.2d 496, 497 (3rd Cir. 1940);* *Richardson v. United States*, 360 F.2d 366, 369 (5th Cir. 1966, *Gray v. United States*, 299 F.2d 467 (D.C. 1962).

Two Supreme Court of the United States decisions, *United States v. Young*, 94 U.S. 153 (1976), and *United States v. Ayers*, 76 U.S. 608, 9 Wall. 608 (1870), contain language which supports Petitioner's position although the Court was ruling on the issue of whether judgments granting new trials were final appealable orders. Thus, in *Young*, the Court citing *Ayers* stated at 153:

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* The Third Circuit also commented: As was said by Judge Carland in *Ft. Dodge Portland Cement Corporation v. Monk*, *supra*, 276 F. at page 114, 'So far as the finality of the Order granting a new trial is concerned, it left the case as if it had never been tried.'

. . . but it was held 'that the order granting a new trial has the effect of vacating the former judgment and to *render it null and void*;' . . . . (Emphasis added).

Accord, Kingman & Co. v. Western Manufacturing Co., 170 U.S. 1193 (1897). The Supreme Court states that the judgment is void, not voidable; and if void, it is, therefore, void for all purposes.

More recently, again on the issue of whether the record discloses a final appealable judgment, the Third Circuit, in *Allegheny County v. Maryland Casualty Co.*, 132 F.2d 894, 896 (1942), held:

> . . . the order itself was not made subject to the condition that it should become effective only if the judgment entered for the defendant should be reversed on appeal. On the contrary, it granted the motion for new trial in absolute and unconditional terms and its necessary effect, therefore, was to vacate the judgment just entered for the defendant n.o.v. which in turn had vacated the original judgment for the plaintiff. For it is settled that the granting of a new trial has the effect of a vacating an existing judgment in the cause. *United States v. Ayers*, 1869, 9 Wall. 608

In *United States v. Smith*, 331 U.S. 469, 91 L.Ed. 1610 (1946), the Supreme Court directed the Court of Appeals for the Third Circuit to *issue a writ of mandamus* to the District Court to effect vacation of his order for a new trial. At first blush, it would appear that this case is not only authority for Petitioner's asserting that a writ of mandamus is an appropriate remedy where the trial judge has acted improperly on matters involving Rule 33 of the Federal Rules of Criminal Procedure, but also for the proposition that the grant of a new trial may be vacated

and a judgment of conviction reinstated. The latter holding, however, is only in the context that:

> Judge Smith was *without jurisdiction* and the Court below should have issued the requested writs of mandamus and prohibition. At 331 U.S. 469.

This distinction is critical to the correct analysis of this case where Judge Moye had jurisdiction to grant the motion for new trial but, as Petitioner contends, lost jurisdiction to sentence Petitioner when the unconditional grant of a new trial occurred. In this regard, *United States v. Smith*, at 331 U.S. 476, states:

> But extension of that time indefinitely is no insurance of justice. On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as to the incidents and nuances of the trial leave his mind to give away to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it is ended as possible, and that decision be not inferred until the trial story has taken on the uncertainty and dimness of things long past.

Again, in the context of the Spiegel case, the Order granting the new trial occurred on April 13, 1977, but it was not until October 27, 1977, some six months later, that the District Court denied Petitioner's Motion for New Trial. Thus, this Court should review the denial of the Writ of Mandamus following the precedent established in *United States v. Smith*, *supra*, which would order the trial judge to vacate the sentence imposed on Petitioner and discharge Petitioner. At this juncture, it is necessary to briefly discuss the ramifications that Section 3161(e) of the Speedy Trial Act (18 U.S.C. §1361) had on this case after Judge Moye granted the new trial on April 13, 1977.

Section 3161(e) of the Speedy Trial Act provides:

> If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial *shall commence within 60 days from the date the action* occasioning the new trial becomes final. (Emphasis added).

Thus, since the unconditional granting of a new trial occurred on April 13, 1977, Petitioner had to be retried by June 13, 1977, or the indictment would be subject to dismissal. It was in this context that Judge Moye, on June 10, 1977, the day after he vacated the Order granting Petitioner a new trial, and just prior to entertaining oral argument on the Government's Motion for Reconsideration, stated:

> We'll take up the Motions for New Trial. Let me ask something that may save us some time. I have attempted by my last order which, I assume you have gotten, simply to maintain the status quo on the Motions for New Trial and too, I *hope, obviate a speedy trial problem.* This was the purpose of that order, not to indicate any leaning one way or another. (App. M-1, p. 1455). (Emphasis added). 6/

6/ The Speedy Trial Act, passed by Congress, is a mandate with which the judiciary may not interfere. Strong criticism of such judicial interference with Acts of Congress appears in a recent unanimous decision of the Supreme Court, *Vermont Yankee Nuclear Power Corp. v. Natural Power Corp. v. Natural Resources Defense Council* (Slip Opinion Decided April 3, 1978).

Petitioner submits that since the Court could not reinstate the jury verdict after he unconditionally granted Petitioner a new trial, and since the Court was without jurisdiction to sentence Petitioner, §3161(e) of the Speedy Trial Act, now prohibits the Government from retrying Petitioner. Thus, Petitioner must be discharged.

III.

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN ENTERTAINING THE GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE DISTRICT COURT'S ORDER GRANTING PETITIONER A NEW TRIAL WHICH ABUSE OF DISCRETION IS A USURPATION OF JUDICIAL POWER WHICH SEVERELY PREJUDICED PETITIONER AND DEPRIVED HIM OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

Petitioner contends that his arguments set forth below in Sub-Issues A through C cumulatively should persuade this Court to find that the District Court abused its discretion to the extent it became a usurpation of judicial power which severely prejudiced Petitioner, depriving him of his liberty and property without due process of law and denying him his right to a speedy trial, when the District Court entertained the Government's Motion for Reconsideration.

In its brief filed with the trial court, the Government argued that the Court should not grant Petitioner's Motion to Dismiss the Government's Motion for Reconsideration since the Government's failure to file its brief in support of its Motion for Reconsideration in a timely fashion did not prejudice Petitioner. Can there be a situation where a criminal defendant was more

prejudiced by the inaction of the Government? Had the Court invoked Local Rule 91.1, or had the Court stricken the Government's brief because it was not filed in the fact of its Order to file by a date certain, May 10, 1977, Petitioner would never have been sentenced. Obviously, the act of sentencing in and of itself is the ultimate prejudice that any defendant can face. Indeed, Petitioner was sentenced to a lengthy period of incarceration which, although he is now free on an appellate bond, has the inherent effect of stigmatizing Petitioner to the extent that his personal and business reputation is being sullied and to the extent that he is suffering severe economic losses, both in income and in continuing legal fees. To argue that there is no prejudice in specious.

A.

WAS THE GOVERNMENT'S MOTION FOR RECONSIDERATION IMPROPERLY ACCEPTED BY THE COURT CLERK BECAUSE IT WAS NOT ACCOMPANIED BY A MEMORANDUM OF LAW AS REQUIRED BY LOCAL RULE 91.1, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA?

Local Rule 91.1 of the United States District Court for the Northern District of Georgia provides:

> Every motion, in both civil cases and criminal proceedings, when filed shall be accompanied by a memorandum of law citing supporting authorities and where allegations of fact are relied upon, affidavits in support thereof. The Clerk *shall not accept* for filing any motion which is not in conformance with this rule. (Emphasis added).

Although the Government, in its pleadings submitted to the trial court, claimed that Petitioner had acceded to the filing of the Motion for Reconsideration without the required Memorandum Of Law, the Affidavits of Attorneys Edward T. M. Garland and Mark J. Kadish dispel any such notion that Petitioner in any way waived his right to assert this violation of Local Rule 91.1. It is axiomatice that Local Rules promulgated by the District Court must be followed. Indeed, in *United States v. Reyes*, 280 F.Supp. 267 (D.C.N.Y. 1968), the District Court stated:

> No memorandum of law, as required by the rules of this court, was filed in support of the motion . . . . For the foregoing reasons, including failure to file the required memorandum, the motion to suppress is denied. At 268-269.

Although Local Rule 91.1 should be followed in all cases, the importance of such rule is most clearly seen in a case such as this if there is ever to be an end to the litigation. Here, where the District Court had already granted a new trial, and where there is a grave question as to whether a Motion for Reconsideration lies at all, it is imperative that when such a motion be filed, it be accompanied by a memorandum of law so that the criminal litigation is not delayed any further. Obviously, the Government was not sensitive to this delay because 36 days passed before it filed its brief in support of its Motion for Reconsideration. In this regard, in the Trial Court, the Government argued that its filing of the Motion for Reconsideration rendered the Order granting Petitioner a new trial *not final*, citing *United States v. Dieter*, 429 U.S. 6, 50 L.Ed.2d 97 S.Ct. 18 (1976), and *Department of Banking v. Pink*, 317 U.S. 264, 87 L.Ed. 254 (1942). A careful analysis of these two decisions reinforces Petitioner's position that the Government's Motion for Reconsideration is not an appropriate pleading when it is filed to obtain a rehearing of an order granting a Motion for

New Trial. Neither *Dieter* nor *Pink* discuss a petition for rehearing relating to the grant of a motion for a new trial. Rather, *Dieter* relates to a petition to rehear the District Court's granting of a motion to dismiss the indictment, while *Pink* relates to whether, in a civil case, a timely petition for rehearing tolls the running of the period limited by U.S.C. §350 for seeking a review by the Supreme Court of the United States of a judgment of a state court.

The *Dieter* holding demonstrates its inapplicability to this case:

> The Court of Appeals misconceived the basis of our decision in *Healey*. We noted there that the consistent practice in civil and criminal cases alike has been to treat *timely petitions for rehearing as rendering the original judgment non-final for purposes of appeal* for as long as the petition is pending. At 50 L.Ed.2d 11 (Emphasis added).

Obviously, then, since the Government would *not be able to appeal* the granting of a new trial *in the first instance*, and since it is clear that an order granting a new trial is not a final appealable order, a Motion for Reconsideration does not lie at all.

B.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN CONSIDERING THE GOVERNMENT'S MOTION FOR RECONSIDERATION BY PERMITTING THE GOVERNMENT TO FILE ITS MEMORANDUM OF LAW IN SUPPORT THEREOF OUT OF TIME AND IN THE FACE OF A COURT ORDER TO FILE ITS MEMORANDUM BY A DATE CERTAIN?

Should the Court find that the trial court's failure to invoke Local Rule 91.1 in and of itself is not sufficient abuse of discretion to constitute a usurpation of judicial power which severely prejudiced Petitioner, then this Court is respectfully requested to carefully review the course of events following April 20, 1977, the date on which the Government submitted its Motion for Reconsideration. It is undisputed that the Government was ordered to file its brief by May 10, 1977. It did not do so. Thereafter, without any oral or written extension of time appearing in the Docket Entry Sheet (App. A), the Government procrastinated in filing its brief in support of its Motion for Reconsideration until May 26, 1977. This additional 16-day hiatus was inexcusable, and demonstrates the Government's cavalier treatment of Petitioner. Now, in order to justify and rationalize this delinquency, the Government speciously states that the Petitioner was not prejudiced by this delay. 7/ The record is devoid of any explanation by the District Court for permitting the Government the luxury of taking 36 days to file its brief in support of its Motion for Reconsideration. Petitioner urges this Court to conclude that the trial court's

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7/ This Court in *Coco v. United States* (Slip Opinion 2787, 2792, March 13, 1978) criticized a mere 2-day delay but did not reverse since no " . . . the slightest prejudice" was shown.

tolerance of the Government's inaction is a usurpation of judicial power which severely prejudiced Petitioner.

C.

DID CONSIDERATION OF THE GOVERNMENT'S MOTION FOR RECONSIDERATION VIOLATE RULE 45(b), FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 45(b), Federal Rules of Criminal Procedure, provides:

> Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; *but the Court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.* (Emphasis added).

Petitioner submits that the entertaining of the Motion for Reconsideration is in itself a violation of the last phrase of Rule 45(b). See *United States v. Robinson*, 361 U.S. 220, 4 L.Ed.2d 259, 80 S.Ct. 282 (1960). In essence, by permitting the Government to file its Motion for Reconsideration and, ultimately, its brief in support thereof, the District Court permitted the Government to do indirectly what it could not do directly, namely, enlarge the period for taking an action under Rules 33 and 34, Federal Rules of Criminal Procedure.

This, too, Petitioner urges, represents an usurpation of judicial power which severely prejudiced the Petitioner.

Thus, Sub-Issues A, B and C, individually and cumulatively, amount to a usurpation of judicial power by the trial judge, all of which severely prejudiced Petitioner and deprived him of his liberty and property without due process of law and denied him his right to speedy retrial.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the denial of the Petition for Writ of Mandamus and/or Prohibition by the Fifth Circuit Court of Appeals.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

Edward T. Garland

EDWARD T. M. GARLAND

Mark J. Kadish

MARK J. KADISH

ATTORNEYS FOR PETITIONER

1012 Candler Building
Atlanta, Georgia 30303
Phone 404/577-2225

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the Clerk of the United States District Court for the Northern District of Georgia, Atlanta, Division; Honorable Charles A. Moye, Jr., Judge, United States District Court for the Northern District of Georgia, Atlanta Division; Mr. William Gaffney, Assistant United States Attorney, Northern District of Georgia, Atlanta Division; and Messrs. Roger Thompson and Frank Petrella, 2403 National Bank of Georgia Building, Atlanta, Georgia 30303, by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon.

This the 7th day of July, 1978.

Edward T. M. Garland

EDWARD T. M. GARLAND

TABLE OF APPENDICES

TABLE OF APPENDICES (Continued)

TABLE OF APPENDICES (Continued)

APPENDIX A

[1] IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1764

IN RE:

STANLEY SPIEGEL,

Petitioner.

FILED: June 6, 1978

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On Petition for Writ of Mandamus and/or Prohibition
to the United States District Court
for the Northern District of Georgia

- - - - -

Before GOLDBERG, AINSWORTH and TJOFLAT,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition is DENIED.

APPENDIX A-1

[1] CRIMINAL DOCKET
UNITED STATES DISTRICT COURT 27972

	TITLE OF CASE	ATTORNEYS
	THE UNITED STATES	For U.S.:
	vs.	P. Bruce Kirwan
	1. STANLEY SPIEGEL 525 Park Ave., N.Y., N.Y. 10021	
	2. EDWARD T. CARROLL 6648 Ptree Ind. Blvd, Doraville 30340	
	3. ALLAN M. HOLLOWAY 2930 Blue Sky Pl, Mtta, Ga. 30060	
8-17-74	4. JOSEPH W. LAWSON 1160 Martin Ridge Rd, Roswell 30075	For Defendant: (See address docket)
	5. ALLEN E. PERKINS 1017 Drexel Parkway Bham, Ala. 35209	
8-17-74	6. JAMES MELVIN HOLLOWAY 254 Chestnut St, Pensacola, Fla. 1521 Plaza Dr, No. 249 Garland, Texas 75040	

STATISTICAL RECORD COSTS

J.S. 2 mailed 1-23-73 Clerk

J.S. 3 mailed Marshall

Violation Conspiracy; to wit; devise a mail fraud Title 18 Docket fee

Sec. 371 & 1341 scheme and use of mail, to execute same

19 DATE 73	PROCEEDINGS
Jan. 23	Criminal Indictment in Thirty-three counts, filed.
	Re ALL DEFTS: Praecipes, filed. Warrants issued and delivered to USM. w/out surety
Jan. 31	Re PERKINS: $10,00 Appearance Bond 1-26-73, filed.
Jan. 31	Re SPIEGEL, CARROLL, A. HOLLOWAY, LAWSON, J. HOLLOWAY: $10,000 Appearance Bond bond, filed. W/out surety.
Feb. 1	Re SPIEGEL: Marshal's return on warrant executed 1-24-73, filed.
	Re PERKINS: Marshal's return on warrant executed 1-26-73, filed.
	Re CARROLL: Marshal's return on warrant executed 1-24-73, filed.
	Re HOLLOWAY: Marshal's return on warrant executed 1-26-73, filed.
	Re A. HOLLOWAY: Marshal's return on warrant executed 1-26-73, filed.
	Re J. LAWSON: Marshal's return on warrant executed 1-26-73, filed.

19 DATE 73	PROCEEDINGS
Feb. 2	ARRAIGNMENT: Re SPIEGEL: Plea of NOT GUILTY, filed (60 days to file motion) Motion for extension pursuant to Rule 12- filed. Re PERKINS: Plea of NOT GUILTY, filed (60 days to file motion.)
	RE AL HOLLOWAY: Plea of NOT GUILTY, filed (60 days to file motion.)
	Re J. M. HOLLOWAY: Plea of NOT GUILTY, filed (60 days to file motion.)
[2] Feb. 2	ARRAIGNMENT (cont'd) Re LAWSON: Plea of NOT GUILTY, filed (60 days to file motion.)
	Re EDWARD CARROLL: Plea of NOT GUILTY, filed (60 days to file motion.)
	Re ALL DEFTS.: 60 days to file motions GRANTED orally.
Mar. 7	Re Lawson: Request for inspection and copying of documents, filed.
Mar. 30	Re A. HOLLOWAY: Motion for extension of time to file motions, filed.
	J. HOLLOWAY (to RCF) and PERKINS.
Mar. 30	Re A. M. HOLLOWAY, J. M. HOLLOWAY, And A. E. PERKINS: Motion for order compelling disclosure and production of evidence by the defts, filed.
	Affidavits in support of defts. motion for discovery, filed. memorandum of law in support of motion for discovery and inspection, filed.
	Motion for bill of particulars by the defts, filed.
	Affidavit in support of motion for bill of particulars, filed.

19 DATE 73 PROCEEDINGS

Memorandum of law in support of motion for bill of particulars filed.
Notice of motion for discovery and inspection and for bill of particulars, filed.
Certificate of service on above, filed.

Apr. 2 Re LAWSON: Motion for production of documents and for inspection and copying with brief in support, filed.

Apr. 3 Re SPIEGEL: Motion for pre-trial conference with brief in support, filed.
Motion for bill of particulars, with brief in support, filed.
Motion for production of evidence favorable to the accused under the provisions of U.S. -vs- Eley, U.S. -vs- Houston, and U.S. -vs- Porter with brief in support, filed.
Motion for discovery and inspection under Rule 16(b) with brief in support, filed.
Motion to compel discovery of Jencks Act Material with brief in support, filed.
Motion for reciprocal discovery with brief in support filed.
Motion for severance of defendant, with brief in support, filed.
Defendant Spiegels motion to adopt and join all motions entered by other defendants which would be beneficial to him, filed.

Apr. 2 Re HOLLOWAY, HOLLOWAY AND PERKINS: Order allowing defendants 30 days after disposition of motions to compel disclosure, production of evidence and motion for bill of particulars, USA having no objection filed. (cc: USA and counsel.)

19 DATE 73 PROCEEDINGS

Apr. 2 Re SPIEGEL: Order allowing defendant 15 days for filing of motions relating to Grand Jury, filed (USA and counsel)

Apr. 3 Re SPIEGEL: Transcript of proceedings of 1-3-73, filed.

Apr. 12 Re LAWSON: Govt's. response to Defendants motion for production of documents and for inspection and copying, filed.
SUBMITTED TO JUDGE MOYE ON DEFENDANT LAWSON'S MOTION FOR INSPECTION AND COPYING OF DOCUMENTS.

Apr. 18 Re LAWSON: ORDER DENYING defendant's motion for production of documents. filed. (cc: USA and counsel)

[3] Apr. 19 Re HOLLOWAY, PERKINS AND HOLLOWAY. JAS.: Govt's. motion for extension of time. up to and including 4-20-73, in which to respond to de motions, filed. Order allowing same, filed. (cc: USA & counsel)

Apr. 18 Re SPIEGEL: Deft's. motion to dismiss the indictment with brief in support, filed.

Apr. 27 Re HOLLOWAY, PERKINS AND HOLLOWAY: Govt's motion for extension of time, up to and including May 1, 1973, in which to respond to d motions, and Order allowing same, filed. (cc USA & counsel)

May 2 Re A. HOLLOWAY: Motion for a Speedy trial. filed.

May 2 SUBMITTED TO JUDGE MOYE ON PENDING MOTIONS.

May 3 Motion for extension of time, up to and including May 7, 1973, in which to respond to deft's. motions, filed. Order allowing same, filed. Re SPIEGEL, A. HOLLOWAY, A. PERKINS. J. HOLLOWAY. cc: USA, Counsel, (to CAM)

19 DATE 73 PROCEEDINGS

May 8 Govt's. Memorandum in answer to defendants' motions. (to CAM)

May 8 Re SPIEGEL: Govt's Memorandum in answer to deft's. motions. (to C

May 17 Re CODY: Motion to change plea and order allowing same, filed.
Plea of GUILTY, filed.
SENTENCE: G.A.G. TWO (2) YEARS Court recommends Atty. General to designate State Institution as place of serv. of this sentence.

May 22 Re SPIEGEL: Deft's. motion for extension of time in which to re to Govt's. response to motions, filed. (to CAM)

May 30 Re: A. HOLLOWAY, J. HOLLOWAY AND PERKINS: Order DENYING Defts'. m to compel and for discovery w/out prejuice as to their right to make the motions after having complied with Eley; as to motion for bill of particulars: DENIED as to 7 & 13, DENIED as to 9 & 15, DENIED, as to 10 and 11, DENIED as to 16, DENIED as to 17 & 18, DENIED as to 20 thru 51 and GRANTED as to 6,8,9,12,14 and 15 within limitations (see order); other no. Re A. HOLLOWAY: DENIED as to motion for speedy trial pursuant to 6th Amendment and Rule 48(b), FRCP;
Re SPIEGEL: As to motion to adopt other motions filed, GRANTED DENED as same as co-defts'. motions.
As to motion to sever, DENIED w/out prejudice to his right to bring motion again at trial; as to motion discovery, DENIED,

19 DATE 73 PROCEEDINGS

Re Eley however, Govt. is directed to su certain evidence to the court for in camera inspection ruling on motion for discovery is therefore DEFERRED to motion for reciprocal discovery. DENIED: as to m for pretrial discovery of Jencks Act, DENIED; as to for bill of particulars, No. 1, GRANTED, Nos. 4 & 5 DENIED (see Nos. 6,8,12 & 14 of co-defendant's), Nos. 7 thru DENIED, No. 39, DENIED: as to motion for pretrial dis being unopposed, GRANTED; motion for pretrial conference being unopposed, GRANTED, hearing set for 9:30 A.M. 9-5-73; as to motion to dismiss the indictment. Gov submitted no response, is afforded 10 days to respond to motion of deft. requesting time to respond to govt's response, DENIED. filed. (cc: USA, Messers. Nodvin Garland)

Jun. 11 Re SPIEGEL: SUBMITTED TO JUDGE MOYE ON DEFTS. MOTION TO DISMISS ORDER 5-25-73.

[4] Jun 11 Re SPIEGEL: Motion for extension of time for filing defts. responses to the govt's. responses to deft's. motion to dismiss indictment, filed (to CAM)

June 25 Re SPIEGEL: Govt's response in opposition to deft Spiegel's motion to dismiss indictment, filed. (to CAM)

June 28 Re SPIEGEL: Motion for extension of time to file supplemental brief in support of motion to dismiss the indictment and respond to Govt's. response, filed.
Order allowing deft. up to and through July 11, 1973 to briefs and response, filed. (cc: counsel and U.S.A.)

19 DATE 73	PROCEEDINGS
June 28	Re SPIEGEL: Motion of deft. Stanley Spiegel for leave to file further pre-trial motions, Memorandum in support, filed.
	Motion of deft. Spiegel for production of Grand Jury vote voting procedures, Memorandum in support, filed.
	Motion of deft. Spiegel to impound and preserve any and all notes and records of postal inspectors relevant to the indictment, Memorandum in support, filed.
July 10	Re SPIEGEL: Motion to comply, filed.
July 11	Re SPIEGEL: Order allowing defendant up to and through July 26, to file supplemental brief, filed.
July 23	Re SPIEGEL: ORDER allowing defendant up until and through 8-15-73 to file supplemental brief, filed. (cc: USA and counsel) CAM
July 27	Re SPEIGEL: Steno notes of 1-24-73, filed.
Aug. 8	Pretrial conference rescheduled for 10-25-73 at 9:30 A.M, counsel not
Aug. 27	Re SPIEGEL: ORDER allowing defendant up to and through 8-25-73 in which to file supplemental brief, filed. CAM
Aug. 27	Re HOLLOWAY: Letter advising that deft. has moved from Pensacola, Fla., filed.
Aug. 27	Re SPIEGEL: Supplemental brief in support of the defendants motion to dismiss, filed. (to CAM)
Sept. 26	Re SPIEGEL, et al: Came on for status- pre-trial hearing before Judge Moye. Verbal motion by Worsbe for continuation: ruling de by Court until 10-25-73. Court directed USA and Attorney to file brief within one week

19 DATE 73	PROCEEDINGS
	on preameters of speedy trial USA directed to comply with Court's Orders regarding disc by end of week.
Sept. 26	Re SPIEGEL: ORDER DENYING defendant's motion to dismiss the indictment, filed. (cc: USA and to counsel. (to Mr. Sparks for Govt.)
Oct. 4	Re SPIEGEL: Motion of Stanely Spiegel concerning mail cover, filed. Brief in support of same, filed.
Oct. 19	Re SPIEGEL: SUBMITTED TO JUDGE MOYE ON DEFTS. MOTION CONCERNING MAIL COVER.
Oct. 24	Re A.M. HOLLOWAY: Motion to dismiss and for other relief, filed.
	Re J. M. HOLLOWAY: Motion to dismiss and for other relief, filed.
	Re A. E. PERKINS: Motion to dismiss and for other relief, filed.
	Re PERKINS, HOLLOWAY & HOLLOWAY: Brief in support of motions to dismiss, filed.
Oct. 26	Re ALL DEFTS: Came on for Pre-Trial Conference. Court verbally direct USA to respond to Defts'. motion regarding "mail cover" within 5 days; Court verbally OVERRULED Mr. Nodvins motion to dismiss based on noncompliance with discovery procedure. Court directed counsel to meet and discuss procedure of on Tuesday 10-30-73 at 10:00 A.M. in U.S. Atty's. office. Mr. Garland verbally moved for OMbusman procedure to be [5] verbally DENIED by Court. Court will hold another

19 DATE 73 PROCEEDINGS

hearing on November 16, 1973 at 4:00 P.M.
Memorandum of Law: Speedy Trial, filed.
Memorandum of U.S.A., filed.

Re ALLAN HOLLOWAY, JAMES HOLLOWAY and PERKINS: Statement of Facts, filed.

Nov. 2 Re S. SPIEGEL: Govt's. response to motion of Stanley Spiegel concerning mail cover, filed.

Nov. 2 Re S. SPIEGEL: SUBMITTED TO JUDGE MOYE ON GOVT:S. RESPONSE TO MOTION CONCERNING MAIL COVER.

Nov. 9 Re SPIEGEL: ORDER dismissing motion concerning mail cover, filed. (CAM) (cc: USA and counsel)

Nov. 10 Re SPIEGEL: In-Camera hearing held. Steno notes sealed as per verbal order of the court, filed.
Further pretrial hearing set for 11-30-73 at 4:00 P.M.

Nov. 29 Re SPIEGEL: Supplemental motions for discovery, filed.
Brief in support, filed.

Nov. 30 Re SPIEGEL: Came on for further pretrial hearings. With consent of all counsel, motion for speedy trial withdrawn from this day forward. Case removed from 1-28-74 trial calendar and to be reset at future date. CAM

Dec. 18 Re SPIEGEL: SUBMITTED TO JUDGE MOYE ON DEFTS. MOTION FOR DISCOVERY

Dec. 19 Re SPIEGEL: Govts. response; to supplemental motion for discovery filed. (TO CAM)

Dec. 21 Re SPIEGEL: Order DENYING supplemental motion for discovery, filed.

1974 PROCEEDINGS

Jan. 8 Re A. M. HOLLOWAY: Motion to be allowed to withdraw as counsel, filed.
Letter to deft. pursuant to Local Rule 1-G (cc USA, counsel)

Jan. 21 Re A. M. HOLLOWAY: SUBMITTED TO JUDGE MOYE ON MOTION TO WITHDRAW AS COUNSEL.

Jan. 21 Re J. M. HOLLOWAY: Motion for leave to withdraw as counsel (by Nodvin & Zuckermen), filed.
Letter to deft. pursuant to Local Rule 71.7, (cc USA, counsel) (reg mail)

Re A. E. PERKINS: Motion for leave to withdraw as counsel (by Nodvin & Zuckerman). filed.
Letter to deft. pursuant to Local Rule 71.7, (cc USA, counsel) (reg mail)

Jan. 31 RE J. M. HOLLOWAY & A. E. PERKINS: MOTIONS TO WITHDRAW AS COUNSEL SUBMITTED TO JUDGE MOYE.

Mar. 4 RE HOLLOWAY, HOLLOWAY AND PERKINS: Came on for hearing on Mr. Nodvin's motion to withdraw as counsel for the defendants and for substitution of Mr. John McGuigan as counsel; court granted motion.

Mar. 14 Re: SPIEGEL, et al, court reporter's steno notes of 3/4/74, filed.

Mar. 14 Re: SPIEGEL, et al, court reporter's steno notes of 11/30/73, filed.

Mar. 14 Re: SPIEGEL, et al, court reporter's steno notes of 11/16/73, filed.

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May 31	Re SPIEGEL, et al: Govt's. Response to Motion to Preserve Noted, filed.
	Affidavit, filed. Govt's. Response to Motion for Production of Grand Jury Vote and Voting Procedure, filed.
	Notices of jury trial 6-10-74 and pre-trial conference 5-31-74 mailed by U.S. Magistrate on 5-22-74 to Mr. Garland, Mr. Hester, Mr. McGuigan, Mr. Tate by Reg. Mail and to Mr. Gaffney on 5-24-74.
[6] June 3	Re SPIEGEL:
	ORDER DENYING motion to impound and preserve any and all notes of postal inspectors relevant to instant indictment (postal inspectors having been made aware and preserved named materials for pre-trial in-camera inspection), filed. (cc: USA, counsel) CAM vtb
	Re SPIEGEL: ORDER allowing defendant and his attorney to examine the "concurrence slip" filed by foreman and members of the grand jury as required by Rule 6(c): motion for production and disclosure of the grand jurors names and voting procedure DENIED, filed. CAM vtb
	Re ALL DEFTS: Came on for pre-trial conference before Judge Moye: Case set for trial June 10, 1974.
	Verbal motion by Deft. Spiegel to renew motion to sever; verbally OVERRULED by Court. Case and procedure at trial discussed. Order to be rendered. vtb
June 4	Motion of Stanley Spiegel to Suppress Tape Recordings, filed.
	Memorandum in support, filed. vtb
	(Complete file before Judge Chancey for Judge Moye) vtb

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June 4	Form of subpoena to produce document or object, filed.
	Motion of Stanley Spiegel to Dismiss the Indictment because of the failure of the United States to Comply with the Court's Discovery Orders. filed Memorandum in support, filed. vtb
June 5	Government's List of Supplemental Witnesses. filed. (to ACL) vtb
June 5	Came on for pre-trial conference before Judge Moye, Court ordered that all criminal records of Govt. Witnesses be furnished to defendant Spiegel by 4:00 P.M. 6-574; Court further ordered that Govt. counsel pull out of their files all documents that defendant Spiegel should not see and show remaining file to deft. Spiegel by 3:00 P.M., 6-5-74.
	Court OVERRULED Deft. Spiegel's motion to Dismiss on grounds set-forth in Brady -vs- Maryland.
	Court ORDERED sealed transcript notes opened for inspection - to be resealed by Clerk and placed in vault (Drawer 12).
	Expert Report - If Counsel for Govt. has or will have reports of experts notify Court and a ruling will issue. Witness List filed. vtb
June 7	Re CARROLL: Motion to change plea and order allowing same, filed.
	Negotiated plea of GUILTY to count 20. filed.
	Notice of sentencing date 7-25-74 to deft.. counsel, USA, USM, Prob. and Clerk. vtb
June 10	Re SPIEGEL, HOLLOWAY, LAWSON, PERKINS, JAMES HOLLOWAY, CAME ON FOR JURY TRIAL BEFORE JUDGE MOYE: Waiver of alternate juror with approval of Court, filed.

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Proposed Voir Dire Questions from Spiegel, filed.
Motion for a Preliminary Charge, filed. Cont'd. vtb

June 11 JURY TRIAL CONT'D: Stipulation regarding check for $7,500.00, filed. Exhibits admitted. Cont'd.

June 12 Re HOLLOWAY: Petition to Enjoin Marvin P. Nodvin, et al from Conducting Discovery in Civil Litigation untill all proceedings of this Court are concluded, filed.
ORDER directing Attorney Marvin P. Nodvin to show cause at 4:30 P.M. on June 13, 1974, why he should not be so enjoined, filed. (cc: USA, USM (to serve Mr. Nodvin) to Mr. McGuigan vtb

June 12 Re SPIEGEL, HOLLOWAY, LAWSON, PERKINS, JAS. HOLLOWAY: JURY TRIAL CONT'D. Counsels for all defts. verbally moved for mistrial: verbal OVERRULED by Court. Outside the presense of the Jury, Jurors Helen McSwain and Harvey Jones were questioned by Court. (Pa

[7] June 12 cont'd. The Court directed counsel not to contact Mr. McSwain and any attempt to do so would be contempt. Court to give ruling. Cont'd. vtb

June 13 JURY TRIAL COND'D: Deft. Spiegel withdrew all prior motions for mistrial. Juror McSwain was called into open court and testified. Juror Jones was called into open court and testified. Court excused these two jurors. All defense counsel verbally moved to sever and for mistrial - verbally DENIED by Court. Exhibits admitted.

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Hearing held on Mr. McGuigan's motion to enjoin discovery by Mr. Marvin Nodvin in State Court regarding this case; Court verbally GRANTED motion. Cont'd. vtb

June 14 CAME ON FOR JURY TRIAL AS CONT'D: Exhibits admitted. Cont'd. vtb

June 17 JURY TRIAL CONTINUED: Exhibits admitted previously and numbers given changed by motion of Govt.: Spiegel's exhibits admitted. Cont'd. vtb
ORDER restraining and enjoining Marvin P. Nodvin, Attorney from prosecuting any legal proceedings, by discovery or otherwise, in such fashion as to interfere with the conduct of this litigation, filed. (cc: Mr. Garland, Mr. Hester, Mr. McGuigan, Mr. Tate, Mr. Gaffney, Mr. Nodvin, Clerk, Superior Court of Fulton County) CAM vtb

June 18 JURY TRIAL CONTINUED: Exhibits admitted. Cont'd. vtb

June 19 JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb

June 20 JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb

June 21 JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb

June 24 JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb

June 25 JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb

June 26 Recessed for the day.

June 27 JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb

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June 27	Motions of Attorneys Kevin Martin and Joe Davis, Jr. to Quash Subpoena Duces Tecum served upon them, being attorneys of record in CA 17293 seeking damages from same defts. in this case, filed. (to CAM) vtb
June 28	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 1	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
July 2	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
July 9	Re HOLLOWAY: Marshal's return on order dated 6-12-74, executed 6-12-74, filed. (Motion for Evidentiary Hearing & gjd (Motion to Quash, filed. Cont'd. acl
July 3	JURY TRIAL CONT'D: Exhibits admitted.
July 8	JURY TRIAL CONT'D: Exhibits admitted. Brief and Statement, filed. acl
July 9	JURY TRIAL CONT'D: Exhibits admitted. Court verbally denied ALLAN HOLLOWAY'S, JAMES HOLLOWAY'S, & PERKINS' motion to dismiss. Cont'd. acl
July 10	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
July 11	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
July 12	JURY TRIAL CONT'D: Exhibits admitted. Defendant, Spiegel's Request to Charge, filed, and DENIED by Court. Cont'd. vtb
July 15	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 16	Movants' Reply to Defendant's Motion for Evidentiary Hearing and Response to Motion to Quash Subpoena, filed. (to CAM) vtb

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July 16	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 17	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 22	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 23	JURY TRIAL CONT'D: Exhibits admitted. Deft. Spiegel verbally moved for severance and mistrial; verbally OVERRULED motion. Mr. McGuigan, verbally joined the motion; verbally OVERRULED by Court. Cont'd. vtb
July 24	JURY TRIAL CONT'D: Deft. Lawson verbally moved for mistrial; verbally overruled by Court. Exhibits admitted. Cont'd. vtb
[8] July 25	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 26	JURY TRIAL CONT'D: Exhibits admitted. Cont'd until further order. vtb
July 31	ORDER increasing attendance fee of jurors now serving to $30.00 per day, as they have now served a minimum of 30 days, filed. (cc: USA and jury clerk, USM) (Order dated 7-26-74) vtb
July 31	Re SPIEGEL: Motion to Dismiss, filed. Memorandum in Supprt, filed. vtb
July 30	Re SPEIGEL et al: Came on for hearing on Joe Davis' and Kevin Martin's motion to quash subpoenas. Court quashed portions of subpoenas and OVERRULED the motion to quash on portions. CAM. vtb
Aug. 2	Re SPIEGEL, et al: ORDER amending order of 7-26-74 to $25.00 per day rather than $30.00 per day, except for Mrs. Byrne, who is to receive increase after she has served 30 days, filed. (cc: USA, USM, Jury Clerk) vtb

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Augs. 5	Re SPIEGEL, et al: JURY TRIAL RESUMED FROM JULY 26, 1974: Outside the presence of the jury, Counsel for deft. Spiegel verbally moved to dismiss and for judgment of acquittal. Court reserved ruling. Counsel for Spiegel verbally moved for severance; verbally OVERRULED by Court. Counsel for all other defendants verbally moved for judgment of acquittal; verbally OVERRULED by Court. On motion of both counsels for Govt. and defendants, Court verbally DISMISSED COUNTS 10 and 28. Exhibits Admitted. Cont'd.
Aug. 6	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
Aug. 7	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Defendant Spiegel's Request to Charge, filed. Defendant Spiegel's motion to strike and dismiss, filed. Motion for mistrial and to strike. Memorandum in support of motion, Motion to dismiss, filed. Memo, filed. Cont'd. vtb
Aug. 8	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
Aug. 9	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
Aug. 12	Re SPIEGEL, et al: JURY TRIAL CONT'd: Juror Mrs. Susan Silver advised the clerk she was sick and not able to attend; The Court and all counsels agreed to proceed with the 11 remaining jurors. Exhibits admitted. Case cont'd. gjd

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Aug. 13	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
Aug. 14	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Outside presense of jury, counsel for all defts. verbally moved for judgment of acquittal. Verbally overruled by the Court. Deft. Spiegel verbally moved to dismiss the indictment. Verbally overruled by the Court. Cont'd. acl
Aug. 15	Re SPIEGEL, et al: JURY TRIAL CONT'D: Deft. Spiegel moved verbally to Dismiss. Verbally DENIED by the Court, exceptions to the charge made and noted Order to feed and lodge filed. The Court informed the jurors that they would be sequestered beginning Aug. 16, 1974. Case cont'd. gjd
Aug. 16	Re SPIEGEL, et al: JURY TRIAL CONT'D. Jury recharged. Deft. Spiegel's additional request to charge, filed. Cont'd. acl Govt's. request that only portion of tape be presented to jury, filed. Memoranda (deft's.), filed. acl
[9] Aug. 17	Re SPIEGEL, et al: JURY TRIAL CONT'D: Deft. Lawson waived presence of counsel. VERDICTS: SPIEGEL: GUILTY to cts. 1-32; NOT GUILTY to ct. 33, filed. AL HOLLOWAY: GUILTY to cts. 1-19, 21, 24, 25, 27-31; NOT GUILTY to cts. 20, 22, 23, 26, 32, 33, filed. MEL HOLLOWAY: NOT GUILTY to all cts., filed. Order of discharge, filed. (cc: USA, Counsel)

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	AL PERKINS: GUILTY to ct. 1; NOT GUILTY to cts. 2-33, filed.
	JOE LAWSON: NOT GUILTY to all cts., filed. Order of discharge, filed. (cc: USA, Counsel)
	Jury was polled. Sentence date set for 9-27-74.
	Jury was released. Defts. Spiegel & Al Holloway directed to report to Prob. Office 8-19-74 at 9:00 a.m.; Deft. Perkins directed to report to Prob. Office 8-20-74 at 9:00 a.m.
	Re SPIEGEL, PERKINS, AL HOLLOWAY: Notice of Sentencing Date 9-27-74 at 2:00 p.m. before CAM (cc: Deft., Counsel, USM, USA, Prob., & Clerk). CAM acl
Aug. 23	Re A. HOLLOWAY & PERKINS, & SPIEGEL: Deft's. Motion for New Trial, filed. acl
	Re SPIEGEL, et al: Motion to Enlarge the Time for Filing a Motion for New Trial & Other Post-Trial Motions, filed. acl
Aug. 26	Re SPIEGEL: ORDER GRANTING defendant until December 15, 1974 to file Amplification and Amendment of the Motion for New Trial and for the filing of a Motion for Judgment of Acquittal, filed. (cc: USA, Counsels) vtb
Aug. 28	Re SPIEGEL, et al: steno notes of proceedings dated 6-5-74 & 6-13-74, filed. gjd
Aug. 29	Re SPIEGEL: Motion for leave of Court to remove and copy enumerated Government Exhibits (for numbers see motion), filed. Motion for leave of Court to remove and copy enumerated Defense Exhibits (see motion), filed. vtb

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Sep. 16	Re SPIEGEL, A. HOLLOWAY & PERKINS: SUBMITTED TO JUDGE MOYE ON MOTIONS FOR NEW TRIAL
	Re SPIEGEL: SUBMITTED TO JUDGE MOYE ON MOTION FOR LEAVE OF COURT TO REMOVE & COPY ENUMERATED GOVT. & DEFENSE EXHIBITS. acl
Sep. 13	Re PERKINS: Deft's. Motion & Affidavit in Support to Proceed on Appeal in Forma Pauperis & ORDER allowing same, filed. acl
Sep. 26	Re SPIEGEL: Order allowing deft to remove and copy certain Govt. Exhibits with the restriction that said documents be returned to the Clerk's office within two hours of their removal, (for numbers of exhibits see order). CAM gjd
Sep. 26	Re ALLAN HOLLOWAY & PERKINS: Order GRANTING defts extension of time in which to file an amended motion for new trial. CAM. cc: USA & defts atty. gjd
[10] Oct. 21	Court reporter's steno notes of proceedings of (6/7/74), filed. dp
Oct. 31	Re SPIEGEL: Motion to dismiss. filed. Memorandum of Law, filed.
	Government Witnesses Directly Affected by Documents found in Withheld Box No. 3, List, filed.
	Supplemental Memorandum of Fact and Law in Support of Motion to Dismiss, filed. vtb
Nov. 5	Re SPIEGEL: ORDERED that within thirty (30) days of the date of the completion of the trial transcript, the Government shall

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submit its responses to the pending Motions to Dismiss; and that defendant shall have fifteen (15) days from that date to respond, thereafter, the Court will have an evidentiary hearing on the pending Motions to Dismiss, filed. (cc: USA and counsel) CAM vtb

ORDER allowing the Government ten (10) days to respond to Motion to Dismiss on grounds of letter from Edward T. Carroll, filed. CAM (cc: USA and counsel) vtb

Nov. 11 Re SPIEGEL: Response to Deft. Spiegel's Motion to Dismiss, filed.

SUBMITTED TO JUDGE MOYE ON DEFT. SPIEGEL'S MOTION TO DISMISS. acl

Nov. 13 Re SPIEGEL: ORDER DENYING Motion to Dismiss, filed. (cc: USA and to each counsel) vtb

Nov. 22 Re HOLLOWAY: ORDER dissolving protective order rendered on 6-13-74, filed. CAM (cc: USA and counsel) vtb

Nov. 27 Re SPIEGEL: ORDER directing that Exhibit C be re-sealed, to be re-opened only upon order of this Court or appropriate appellate court, filed (cc: USA and counsel) vtb

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Jan. 27 Re SPIEGEL: Motion for Grand Jury Charge, filed. vtb

FEB. 11 SUBMITTED ON DEFT SPIEGEL'S MOTION FOR GRAND JURY CHARGE. skb

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Feb. 18 Re SPIEGEL: ORDER GRANTING defendant's unopposed motion for grand jury charge, pursuant to Local Rule 91.2, filed. (cc: USA and counsel, also court reporter) vtb

Mar. 13 Steno notes of proceedings dated July 15, 16, 17, 22, 23, 24, 1974 and August 14, 1974, filed. gjd

April 1 Transcript of proceedings dated July 8, 1974; July 9, 1974; July 10, 1974; July 11, 1974; and July 12, 1974, filed. dwp

April 2 Transcript of proceedings dated June 24, 1974; June 25, 1974; June 27, 1974; June 28, 1974; July 26, 1974; and August 12, 1974, filed.

April 18 RE: ALAN M. HOLLOWAY: Letter pursuant to Local Rule 71.7 as to Attorney John McGuigan, filed. Copies to USA, counsel, and defendant.

Apr. 28 SUBMITTED TO JUDGE MOYE ON REQUEST OF JOHN McGUIGAN TO WITHDRAW AS COUNSEL FOR DEFT ALAN M. HOLLOWAY.

May 15 Re PERKINS: Request of John McGuigan to withdraw as counsel, filed. (Advise to comply with Local Rule 71.7) (Submit on Perkins & Holloway when complied with)

May 20 Steno notes of proceedings dated July 8, 9, 10, 11 & 12, 1974, filed.

May 21 Transcript of proceedings of 7-15-74, 7-16-74, 7-17-74, 7-22-74, 7-23-74, 7-24-74, 8-14-74, filed.

July 1 Transcript of proceedings dated 6/14/75, filed.

Sept. 16 Steno notes of proceedings dated 6-27-74, 7/25/74, 7/26/74, and 8/12/74, filed.

Sept. 22 Transcript of proceedings dated 6-17-74 and 6-18-74, filed.

Oct. 28	Transcript of proceedings 6-19-74 and 6-20-74, filed. jsr
	Transcript of proceedings 8-5-74, 8-12-74, 8-15-74, 8-16-74, and 8-17-74, filed. jsr
Nov. 19	Court reporter's transcript of proceedings dated 6/20/74, 6/21/74, 7/1/74, 7/2/74, and 7/3/74, filed. dwp
Dec. 23	RE: SPEIGEL' Defendant's Request for ruling on the re-issue of defendant's failure to waive the selection of an alternate juror, prior to the filing of an amended Motion for New Trial, filed. SUBMITTED TO JUDGE MOYE ON DEFENDANT'S REQUEST. dwp
1976	Jan. 22: Letters from Mark Kadish and Roger Thompson, re transcripts. vtb
Jan. 26	Court reporter's steno notes of the proceedings dated June 20 & 21, 1974, July 1-3, 1974, 6-20-74, filed. jld
	Court reporter's steno notes of the proceedings dated 6-10-74, 6-11-74, 6-12-74, 6-13-74, 6-14-74, 6-18-74, 6-19-74, 6-20-74, 8-5-74, 8-12-74, 8-15-74, filed. jld
Jan. 30	Transcript of proceedings dated June 13, 1974, filed. jsr
Feb. 3	Transcript of proceedings dated 6-10-74, 6-11-74, and 6-12-74, filed. jsr
Feb. 6	Court reporter's transcript of the proceedings dated 11-16-73, 11-30-73, 6-3-74, 6-5-74, filed. jld
Mar. 23	Court reporter's transcript of proceedings of 7-24-74, 8-6-74, 8-7-74, 8-8-74, filed. vtb
Mar. 26	ORDER, dated 3/24/76, allowing defendant STANLEY SPIEGEL to have 45 days from the date of this Order to file his Motion for New

	Trial and a Memorandum of Law in support thereof, and that the United States Attorney shall have thirty (30) days from the date of the filing of said Motion for New Trial and Memorandum of Law in support thereof. to submit its response, filed. CAM (cc: USA & counsel) dwp
April 6	RE: Spiegel: Defendant's Motion relating to Grand Jury Proceedings with Memorandum of Law in Support, filed. jld
April 16	RE SPIEGEL: SUBMITTED TO JUDGE MOYE ON DEFENDANT'S MOTION RELATING TO GRAND JURY PROCEEDINGS. jld
April 29	RE: SPIEGEL: Government's Response to Motion Relating To Grand Jury Proceedings, with Brief in Support, filed. (TO CAM) . . . . .jld
May 3	RE ALL DEFTS.: ORDER correcting mistake in record of hearings to show that the hearing in RE STANLEY SPIEGEL v. JOHN STOKES, et al, took place on Jan. 23, 1973 rather than Jan. 24, 1973, and DENYING defts.'s request for production of matters relating to postal inspector's testimony before the grand jury, filed. aea
	cc: USA, counsel, & court reporter aea
May 13	Court reporter's transcript of the proceedings, dated Aug. 9, 1974 and Aug. 13, 1974 (2 vols.), filed. clh
May 17	Letter, dated May 12, 1976, from J. Roger Thompson, to CAM confirming conversation of May 11, 1976, in which agreement was made to allow thirty (30) days from May 11. 1976, for the filing of the amended Motion for New Trial as to all defendants, with Judge Moye's approval, filed. dwp
	Bill Gaffney advised by telephone conversation on 5/17/76. dwp

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May 24	ORDER, dated 5/21/76, directing that the Defendant's Motion for New Trial, and other post-trial motions, shall be filed no later than June 11, 1976; that the Government shall have thirty (30) days to respond thereto, and to Defendant Spiegel's pending Motion to Dismiss; and that within fifteen (15) days from the date the Government files its response Defendants shall have fifteen (15) days to reply to the Government's Response to Defendants Motion for New Trial, other post-trial motions, and Defendant Spiegel's Motions to Dismiss, filed. CAM (cc: all counsels & USA) dwp
[12] June 11	RE: HOLLOWAY AND PERKINS: Defendants' Amended Motion for New Trial, filed. Brief in Support, filed. Certificate of service dated 6-11-76, by hand. jld
	1. RE: SPIEGEL: Defendant's Motion for Judgment of Acquittal and/or Arrest of Judgment, filed. Memorandum of Fact and Law in Support, filed.
	2. Defendant's Exhibits to Memorandum in Support of Judgment and/or Arrest of Judgment, filed.
	3. Defendant's Motion for New Trial, filed. Memorandum of Fact and Law in Support, filed.
	4. Defendant's Exhibits to Memorandum in Support of Motion for New Trial, filed, Certificate of service dated 6-11-76, by hand. jld
July 15	RE: SPIEGEL, HOLLOWAY & PERKINS: Government's Motion for extension of time for the filing of its response to defendant Spiegel's

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	Motion for New Trial and Motion for Judgment of Acquittal and/or arrest of judgment; and defendants Holloway and Perkins' Amended Motion for New Trial, requesting extension for time up to and including August 6, 1976, and ORDER, dated 7/15/76, allowing counsel for the U.S. to have until August 2, 1976, in which to file its response, and counsel for the defendants shall have until August 13, 1976, in which to file any desired reply, filed. CAM (cc: USA & counsels) dwp
August 2	Re SPEIGEL, HOLLOWAY & PERKINS: Government's Motion for extension of time for the filing of its response to deft. Spiegel's Motion for Judgment of Acquittal and/or Arrest of Judgment; and defendants Holloway and Perkins' Amended Motion for New Trial up to and including 8-27-76, and ORDER, dated 8-2-76, counsel for the U.S. to have until August 27, 1976, in which to file its response, and counsel for the defendants shall have until September 10, 1976, in which to file any desired reply. CAM (cc: USA & counsels) clh
Aug. 31	RE: SPEIGEL, HOLLOWAY & PERKINS: Government's Motion for extension of time, up to and including September 3, 1976, for filing response to defendant Spiegel's Motion for New Trial and Motion for Judgment of Acquittal and/or arrest of judgment; and defendants Holloway & Perkins' Amended Motion for New Trial, and ORDER dated 8/31/76, directing that the US Attorney have until 9/3/76 to file his response, and counsel for the defts. shall have until 9/17/76, in which to file any desired reply, filed, CAM (cc: USA & counsel) dwp

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Sept. 7	Re SPEIGEL: Government's response in opposition to Deft. Speigel's motion for judgment of acquittal and/or arrest of judgment w/memorandum in opposition to deft.'s motion filed. (w/1 vol. attachments)
	Re SPIEGEL, HOLLOWAY, & PERKINS: Government's response in opposition to Defts'. motion for new trial and amended motion for new trial, with memorandum of argument & authority in opposition and 1 vol. attachments, filed. clh
Sept. 9	Motion for new trial and briefs to CAM. clh
Sept. 10	RE: SPIEGEL, HOLLOWAY & PERKINS: ORDER, dated 9/9/76, directing that counsel for the defendants shall have until September 21, 1976, to file replies, if desired, to the government's response to all pending post trial motions, filed on September 7, 1976, filed. CAM (cc: USA & counsel) dwp
Sept. 14	Re SPIEGEL; ORDER, dated 9/13/76, extending time for deft. to file a Reply Brief to and including the 27th day of September, 1976, filed. CAM. (cc: to USA and counsel). jsr
Sept. 27	Deft's. reply brief to govt's. response to deft's. motion for judgment of acquittal and/or arrest of judgment.
	Deft's. reply brief to govt's. response to deft's motion for new trial, filed.
Sept. 28	SUBMITTED TO JUDGE MOYE ON SPIEGEL'S MOTION FOR JUDGMENT OF ACQUITTAL AND/OR ARREST OF JUDGMENT AND MOTION FOR NEW TRIAL AND DEFTS' HOLLOWAY PERKINS & SPEIGEL MOTION FOR NEW TRIAL.

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Sept. 28	Re SPIEGEL: Motion to strike affidavit of F. Carter Tate from govt's. response to deft's. memorandum of law in support of motion for new trial w/memorandum of law in support, filed. clh
Sept. 29	SUBMITTED TO JUDGE MOYE ON SPIEGEL'S MOTION TO STRIKE. clh
Oct. 7	Court reporter's steno notes of the proceedings, dated 8-8-76 & 8-9-76, filed. clh
Oct. 12	Govt's response to motion to strike. filed. (Orig. to CAM) clh
Oct. 13	ORDER setting oral arguments of evidentiary matters or other matters relevant to Court's consideration of motions for hearing 12-20-76 at 1:30 P.M. filed.
	(Order dated 10-8-76 rec'd 10-13-76 and copies served USA, counsels for each deft.) vtb
Oct. 19	Letter, dated 10-12-76, from Mark Kadish to Judge Moye requesting that the Court strike the Tate Affidavit and all references to it in govt. responses, filed.
Dec. 20	RE: HOLLOWAY, PERKINS & SPEIGEL: CAME ON FOR HEARING ON DEFENDANTS' MOTIONS FOR NEW TRIAL BEFORE JUDGE MOYE: The Court heard from counsel. CONT'D until 12/21/76 at 3:00 p.m. dwp
Dec. 21	HEARING ON MOTIONS FOR NEW TRIAL CONT'D: After discussions, it was determined that a further hearing would be set. vtb
1977	
Jan. 31	Evidentiary hearing reset from 2/7/77 to 2/22/77. Counsel notified. njn

19 DATE 77 PROCEEDINGS

Feb. 4	Court Reporters Steno notes of 12/20/76; 12/21/76, (Smith) filed. ch
[14] Feb. 22	RE: SPIEGEL, HOLLOWAY, & PERKINS: CAME ON FOR HEARING ON DEFENDANTS' MOTIONS FOR NEW TRIAL BEFORE JUDGE MOYE: Exhibits admitted. Defts' counsel moved to strike the testimony of F. Carter Tate, The Court DENIED the motion. CONT'D. dwp
Feb. 23	RE: SPIEGEL, HOLLOWAY, & PERKINS: HEARING CONTINUED: Evidence continued. The Court directed the parties to file briefs by 3/11/77, if they so desire. CONT'D. dwp
Feb. 24	RE: SPIEGEL, HOLLOWAY, & PERKINS: HEARING CONTINUED: Evidence admitted. The Court retained the file and exhibits. Case recessed. dwp
March 11	Re: HOLLOWAY & PERKINS: Supplemental brief in support of motion for new trial, filed. (to CAM). jsr
	Re: SPIEGEL, HOLLOWAY & PERKINS: Government's Supplemental Brief Regarding the Defendants' Waiver of a Jury of Twelve, filed. (to CAM on 3/14.)
	Re: SPIEGEL, HOLLOWAY & PERKINS: Government's Proposed Finding of Fact, filed. (to CAM on 3/14.) jsr
Mar. 24	Court Reporter's Steno Notes of the proceedings of 2-22-77 (Smith) (Motion For New Trial), filed. bmm
Apr. 14	RE SPIEGEL, A. HOLLOWAY, & PERKINS: ORDER dated 4-13-77, GRANTING new trial and stating that case will be tried Tues., 5-24-77, at 10:00 a.m., filed. CAM cc: USM, prob., defts, counsels, PSA aea

19 DATE 77 PROCEEDINGS

April 20	Re: SPIEGEL, HOLLOWAY & PERKINS: Government's Motion for Reconsideration (of Order dated 4/13/77), filed.
April 21	Re: SPIEGEL, HOLLOWAY & PERKINS: Government's Motion for Reconsideration to CAM w/order dated 4/13/77. jsr
May 9	RE SPIEGEL, A. HOLLOWAY, & PERKINS: Govt's motion to continue trial set for 5-24-77. filed. SUBMITTED TO JUDGE MOYE aea
May 20	RE SPIEGEL: Response to Govt's Motion for Reconsideration, filed.
	Response to Motion to Continue Trial, filed.
	Motion to Dismiss Motion for Reconsideration. filed.
	(origs. of all the above to Judge Moye) aea
May 26	RE SPIEGEL, HOLLOWAY, PERKINS: Brief in Support of Motion for Reconsideration, filed. (orig to Judge Moye) aea
June 3	Govt's Response Opposing Deft Spiegel's Motion to Dismiss the Motion for Reconsideration, filed.
	Govt's Motion for Hearing with brief in support. filed. aea
	(origs. to Judge Moye)
June 6	RE SPIEGEL: Motion for Extension of Time for filing response to Govt's Brief in Support of Motion for Reconsideration and ORDER extending same until 6-7-77, filed. cc: USA. counsel aea

19 DATE 77	PROCEEDINGS
June 8	RE SPIEGEL: Reply to Govt. Response Opposing Deft Spiegel's Motion to Dismiss the Motion for Consideration and Memorandum of Law in Support Thereof, filed.
	Response to Govt's Motion for Hearing, filed. (origs to CAM) aea
[15] June 9	Verbal ORDER of CAM, allowing attorney Richard C. Freeman to examine exhibits and copy at his own expense. jsr
June 9	ORDER, dated 6/8/77, GRANTING the govt's motion for reconsideration of the Order of April 14, 1977, VACATING that order of April 14, 1977, and stating that the Court will reconsider deft's motion for new trial, and that hearing is scheduled for Friday, June 10, 1977, at 1:30 P.M, filed. CAM. (copies served by CAM). jsr
June 10	CASE CAME ON BEFORE CAM FOR ARGUMENTS ON MOTION FOR NEW TRIAL: The Court took the matter under advisement. jsr
June 17	Court reporter's steno notes of the proceedings of 6-10-77, filed. (PUGH) . . . . . clh
Aug. 10	Court reporter's steno notes of the proceedings of 6/10/77, (hearing on motion for new trial), filed. (Smith). jsr
Oct. 27	RE: SPIEGEL, HOLLOWAY, & PERKINS: ORDER, dated 10/26/77, OVERRULING and DENYING defendants' motions for new trial, filed. CAM (cc: all counsels & USA) dwp
Dec. 12	RE: HOLLOWAY & PERKINS: Waiver of 45 day sentence requirement by letter from counsel, filed. drr
	RE: SPIEGEL: Waiver of 45 day sentence requirement by letter from counsel, filed. drr

19 DATE 77	PROCEEDINGS
Dec. 15	RE ALL: ORDER DENYING Defts' Motion for Judgment of Acquittal, filed. (c to c and USA) kg
Dec. 21	RE SPIEGEL, CARROLL, A. HOLLOWAY & PERKINS: Notice to deft., counsel. USA. USM. Prob & Clerk setting sentence date for January 24, 1978 at 1:30 P.M. before CAM. gjd
1798	
Jan. 13	RE: SPIEGEL: Motion to Dismiss Indictment for Lack of Speedy Re-Trial. filed. Brief in Support, filed. Motion to Dismiss Indictment, Alternatively Motion to Vacate Orders, and Motion to Bar Sentencing, or Alternatively Motion to Stay Sentencing, filed. Brief in Support, filed. (Dups to CAM) drr
Jan. 20	Re SPIEGEL, A. HOLLOWAY & PERKINS: Notice to deft., counsel for defts. USA. USM. Prob. & Clerk changing sentence date to FEBRUARY 7, 1978 at 1:30 P.M. before CAM. gjd
Jan. 20	Re CARROLL: Notice to deft., counsel. USA, USM, Prob. & Clerk changing sentence date to FEBRUARY 14, 1978 at 1:30 P.M. before Cam. gjd
Jan. 23	RE: SPIEGEL: Govt Motion for Extension of Time, filed (orig to CAM) drr
Jan. 23	RE: HOLLOWAY & PERKINS: Deft Motions to Adopt Motions Filed by CO-Deft, Stanley Spiegel and Memorandum in Support. filed. drr
Jan. 30	RE: SPIEGEL: SUBMITTED TO CAM ON DEFT MOTIONS TO DISMISS. drr
Jan. 30	RE: SPIEGEL, HOLLOWAY, & PERKINS: Govt Response to Defts' Motion to Dismiss, or Alternatively, to Vacate Orders, filed. (orig to CAM) Brief in Support, filed. drr

19 DATE 78	PROCEEDINGS
Jan. 31	RE: SPIEGEL: Deft Supplemental Brief in Support of Motion to Dismiss, Alternatively Motion to Vacate Orders, or Alternatively to Bar Sentencing, And Motion to Dismiss for Lack of Speedy Re-Trial, filed. (orig. to CAM) drr
[16] Feb. 1	RE ALL: ORDER dated 2/1/78 by CAM DENYING deft's motion to Dismiss indictment, and alternatively to stay sentencing and to dismiss indictment for lack of speedy re-trial, filed. (c to c and USA) kg
Feb. 8	RE: PERKINS: SENTENCE: C.A.G. ONE (1) YEAR CAM
	RE: HOLLOWAY: SENTENCE: C.A.G. FIVE (5) YEARS on Count One; FIVE (5) YEARS on Count Two to run consecutively with count one; FIVE (5) YEARS on Counts 3-19, 23, 24, 25, and 27-31, concurrently w/ each other and concurrent with count one. Count two is suspended, Probation, FIVE (5) YEARS consecutive to sentence in count one. CAM cls
Feb. 9	RE: SPIEGEL: SENTENCE: C.A.G. FIVE (5) YEARS on Count 1; C.A.G. EIGHTEEN (18) MONTHS on count 2 consecutive to count 1; C.A.G. FIVE (5) YEARS on count 3, consecutive to ct. 1 & 2, suspended, FIVE (5) YEARS Probation; C.A.G. FIVE (5) YEARS on counts 4-13 concurrent to count 1; C.A.G. EIGHTEEN (18) MONTHS on counts 14-22 concurrent to count 2; C.A.G. FIVE (5) YEARS on counts 29-32 consecutive to counts 1 & 2 and concurrent to count 3, Suspended, FIVE (5) YEARS Probation, to run concurrent to count 3. Defendant will be allowed to make appeal bond. Defendant must surrender his passport. cls

19 DATE 78	PROCEEDINGS
Feb. 10	RE: SPIEGEL: $20,000.00 Appeal Bond, w/ surety, filed. cls
Feb. 13	RE: SPIEGEL: Notice of Appeal, dated 2-13-78 To the Fifth Circuit from the judgment and sent 2-9-78, jury verdict 8-17-78, granting Govt. motion for reconsideration of the Dist. Court's 4-4-77, Order granting the deft. a new trial; etc. (see docket) (cc: C.A., counsel, U.S.A., court reporter, surety (appeal). bmm
Feb. 9	RE: HOLLOWAY: $15,000 Appeal Bond, w/ surety, filed
	ORDER specifying methods and conditions of release on appeal, filed.
	RE: PERKINS: $5,000 Appeal BOnd, w/ surety, filed.
	ORDER specifying methods and conditions of release on appeal, filed. dmb
Feb. 16	RE: SPIEGEL: Pretrial Serv. Memo stating that deft. posted appeal bond in the amt. of $20,000.00 w/surety, dated 2-9-78, filed. bmm
	RE: HOLLOWAY: Pretrial Serv. Memo stating that deft. posted appeal bond in the amt. of $15,000.00 w/surety, dated 2-8-78, filed. bmm
	RE: PERKINS: Pretrial Serv. Memo stating that deft. posted appeal bond in the amt. of $5,000.00 w/surety, filed. bmm
Feb. 17	RE: PERKINS & HOLLOWAY: Notice of Appeal, filed. (cc: USA, Counsel, Court Reporter, USCA w/copy by reg. mail) dmb
[17] Feb. 23	RE SPIEGEL: Ltr. advising that deft. surrendered passport to John Schoenberger of Pre-Trial Office in N.Y. City. (it should be forwarded soon–per mh) kg
March 1	RE: SPIEGEL: Passport of Deft. filed and placed in vault. cls

APPENDIX B

[1310] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES	:	
	:	
v.	:	CRIMINAL ACTION
	:	NO. 27972
STANLEY SPIEGEL, et al.	:	

FILED: April 14, 1977

ORDER GRANTING NEW TRIAL

Defendants' motion for new trial is granted by reason only of the grounds relating to final decision by eleven jurors only. While there are substantial other issues raised, the Court would not grant a new trial on the basis of any one of them, but the Court must, of course, keep in mind that in the Court of Appeals, a ground for new trial, even though inadequate in itself, may have a tandem or enhancing effect. *U. S. v. Williams*, 523 F.2d 1203 (1975).

The case is declared on trial before this Court on Tuesday, May 24, 1977, at 10:00 a.m.

All parties and counsel are hereby directed to avoid and eliminate any conflicts as this case is governed by the Speedy Trial Act and must be tried expeditiously.

SO ORDERED, this 13 day of April, 1977.

/s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

[1311] UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 27,972A
	:	
STANLEY SPIEGEL, et al	:	

FILED: April 20, 1977

MOTION FOR RECONSIDERATION

The United States of America, by its undersigned attorneys, John W. Stokes, Jr., United States attorney, Northern District of Georgia, and William P. Gaffney, assistant United States attorney, Northern District of Georgia, moves that the district court reconsider its Order granting a new trial for the following reasons:

1.

The Order of April 13, 1977, fails to articulate the underlying basis for the district court's decision.

2.

No factual findings were made on the issue of the eleven-juror verdict.

3.

No legal conclusions were stated on the issue of the eleven-juror verdict.

4.

No identification was made of any issues apart from the eleven-juror verdict, which may have joined, in tandem, to deprive movants of a fair trial.

5.

No factual findings, nor legal conclusions have been made regarding any issues which may have operated in tandem to deprive movants of a fair trial.

Wherefore, the government respectfully urges the court to do the following:

[1312] (1) vacate the Order dated April 13, 1977;

(2) identify the substantial issues, other than the verdict by eleven jurors, which the court fears may in tandem have denied movants a fair trial;

(3) promptly thereafter, schedule this case for oral argument on the eleven-juror issue, and the other identified issues; and

(4) issue a written opinion fully setting forth the court's factual findings and legal conclusions on all relevant issues.

In the alternative, the government prays:

(1) that the Order of April 13, 1977, be supplemented with specific factual findings and legal conclusions on the issue of the eleven-juror verdict;

(2) that the district court expressly determine whether a tandem effect denying movants a fair trial was created by any of the remaining issues; and, if so,

(3) that specific factual findings and legal conclusions be made on these issues.

Respectfully submitted,

JOHN W. STOKES, JR.
United States Attorney

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the (parties) in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery.

This 20 day of April 1977
/s/ William P. Gaffney
Assistant United States Attorney
Attorney for the United States of America

APPENDIX D

[1317] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
: CRIMINAL INDICTMENT
v. :
: NO. 27,972
STANLEY SPIEGEL, et al :

FILED: May 9, 1977

MOTION TO CONTINUE TRIAL

The United States of America, by its undersigned attorneys, moves that the trial date set forth in the Order Granting New Trial be continued, and in support of this motion states the following:

1.

The April 13 Order Granting New Trial sets the trial date for May 24, 1977.

2.

The government is seeking a reconsideration of that Order, a motion having been filed on April 20 and a supporting brief is presently being prepared.

3.

In the event the court refuses to reconsider its Order Granting New Trial, the government will seek appropriate appellate remedy.

4.

The sixty-day provision in the Speedy Trial Act. 18 U.S.C. §3161(e), does not apply until the date the action occasioning the retrial becomes final.

[1318] WHEREFORE, good cause having been shown, the government prays that the commencement of retrial presently scheduled for May 24 be continued and reset, if necessary, at such time as the Order Granting New Trial becomes final.

Respectfully submitted,

JOHN W. STOKES, JR.
UNITED STATES ATTORNEY

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the party (parties) in the foregoing matter with a copy of this pleading by hand delivering a copy of same.

This 6th day of May 1977
/s/ William P. Gaffney
Assistant United States Attorney
Attorney for U.S.

APPENDIX E

[1320] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
:
V. : CRIMINAL NO. 27,972A
:
STANLEY SPIEGEL, ET AL :

FILED: May 20, 1977

MOTION TO DISMISS MOTION FOR RECONSIDERATION

Now comes Defendant Stanley Spiegel, through counsel, and moves this Honorable Court for an Order dismissing the Motion for Reconsideration filed by the United States of America, showing the following reasons in support thereof:

1.

On April 14, 1977 an Order granting a new trial was entered. On April 20, 1977 the United States of America filed a Motion for Reconsideration, a copy of which is attached hereto as Exhibit A. On or about the same time Assistant United States Attorney, William Gaffney, requested leave of Court to file a brief in support of his Motion for Reconsideration. This request was granted.

2.

On April 26, 1977, Counsel for Defendant Spiegel submitted a letter to the Court stating counsels understanding that the

ten-day time period for filing pre-trial motions. A copy of this ten-day time period for riling pre-trial motions. A copy of this letter is attached hereto as Exhibit B.

3.

On or about May 6, 1977, at a conference in Chambers, the Court directed Assistant United States Attorney Gaffney to file his brief no later than Monday, May 9, 1977. At that time, Counsel for Defendant Spiegel asserted that it was his opinion that the Court's April 14, 1977 Order granting a new trial was a final order and that, therefore, under the Speedy Trial Act, [1321] Defendant was entitled to a new trial within sixty (60) days of this Order. At the same conference, the United States filed a motion wherein it requested the Court to declare its April 14 Order as not final, pending its ruling on the Motion for Reconsideration. The Court refused to accede to this request.

4.

At the conference on May 6, the Court directed that counsel for Defendant Spiegel file its brief no later than Friday, May 13, 1977. Defense counsel stated he would do so despite the fact he was scheduled for trial in *United States v. J. Marshall Brown* that very week. As the Court is aware, Counsel for Defendant, Mark J. Kadish, was hospitalized on Friday evening, May 6, 1977, and the Brown trial was set over until the week of May 25, 1977.

5.

The Government failed to file its brief on Monday, May 9, 1977, and counsel for Defendant Spiegel has not been furnished with a copy of any Order extending the time for the filing of the Government's brief.

6.

As of the date of this Motion to Dismiss, counsel for Defendant Spiegel still has not been served with the Government's brief.

7.

Since the Government's brief is out of time, Defendant Spiegel moves to dismiss the Motion for Reconsideration.

WHEREFORE, for all the foregoing reasons, Defendant Spiegel prays that the relief herein requested be granted.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND

/s/ Mark J. Kadish
MARK J. KADISH

/s/ Frank Joseph Petrella
FRANK JOSEPH PETRELLA
ATTORNEYS FOR DEFENDANT SPIEGEL

1012 Candler Building
Atlanta, Georgia 30303
Phone 577-2225

[1322] CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Motion to Dismiss Motion for Reconsideration upon Mr. William Gaffney, Assistant United States Attorney, by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 19th day of May, 1977.

/s/ Mark J. Kadish
MARK J. KADISH

APPENDIX E-1

[1323] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
:
V. : CRIMINAL NO. 27,972A
:
STANLEY SPIEGEL, ET AL :

FILED: May 20, 1977

RESPONSE TO MOTION TO CONTINUE TRIAL

Now comes Defendant Stanley Spiegel, through counsel, and moves this Court to deny the Motion to Continue Trial, showing the following in support thereof:

1.

On April 14, 1977, an Order granting a new trial was entered. On April 20 the United States of America filed a Motion for Reconsideration, a copy of which is attached hereto as Exhibit A. On or about the same time Assistant United States Attorney, William Gaffney, requested leave of Court to file a brief in support of his Motion for Reconsideration. This request was granted.

2.

On April 26, 1977, Counsel for Defendant Spiegel submitted a letter to the Court stating counsel's understanding that the filing of the Motion for Reconsideration would toll Defendant's

ten-day time period for filing pre-trial motions. A copy of this letter is attached hereto as Exhibit B.

3.

On or about May 6, 1977, at a conference in Chambers, the Court directed Assistant United States Attorney Gaffney to file his brief no later than Monday, May 9, 1977. At that time, Counsel for Defendant Spiegel asserted that it was his opinion that the Court's April 14, 1977 Order granted a new trial was [1324] a final order and that, therefore, under the Speedy Trial Act, Defendant was entitled to a new trial within sixty (60) days of this Order. At the same conference, the United States filed a Motion to Continue Trial wherein it requested the Court to declare its April 14 Order as not final pending the ruling on the Motion for Reconsideration. The Court refused to accede to this request.

4.

At the conference on May 6, the Court directed that counsel for Defendant Spiegel file its brief no later than Friday, May 13, 1977. Defense counsel stated he would do so despite the fact he was scheduled for trial in *United States v. J. Marshall Brown* that very week. As the Court is aware, Counsel for Defendant, Mark J. Kadish, was hospitalized on Friday evening, May 6, 1977, and the Brown trial was set over until the week of May 25, 1977.

5.

The Government failed to file its brief on Monday, May 9, 1977, and counsel for Defendant Spiegel has not been furnished with a copy of any Order extending the time for the filing of the Government's brief.

6.

As of the date of this Response to Motion to Continue Trial, counsel for Defendant Spiegel still has not been served with the Government's brief.

7.

Since the Government's brief is out of time, since this Court's Order granting a new trial was entered on April 14, 1977, and since the Court has previously advised all counsel to be ready for trial on or about June 1, 1977, Defendant Spiegel moves the Court to deny the Motion to Continue Trial.

[1325] WHEREFORE, for all the foregoing reasons, Defendant Spiegel prays that the Motion to Continue Trial be denied.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND

/s/ Mark J. Kadish
MARK J. KADISH

/s/ Frank Joseph Petrella
FRANK JOSEPH PETRELLA

ATTORNEYS FOR DEFENDANT SPIEGEL

1012 Candler Building
Atlanta, Georgia 30303
Phone 577-2225

[1326] CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Response to Motion to Continue Trial on Assistant United States Attorney, William Gaffney, by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 20th day of May, 1977.

/s/ Mark J. Kadish
MARK J. KADISH

APPENDIX F

[1329] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
: CRIMINAL ACTION
v. :
: NO. 27,972
STANLEY SPIEGEL, et al :

FILED: May 26, 1977

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

The court in this criminal matter has pending the government's motion to reconsider its Order Granting New Trial. Post-trial motions under rules 29(c) and 33, F.R.Crim.P. by defendants Spiegel, Holloway, and Perkins (hereinafter referred to as movants) were filed alleging conduct by the government, before and during the trial, as well as trial errors committed by the court require that judgment of acquittal be entered or a new trial granted. An order granting a new trial was filed April 14, 1977. It appears that this order was based solely upon the conclusion that a prejudicial trial error was committed affecting the movants' substantial rights by discharging the twelfth juror prior to deliberation. This order nullifies ten weeks of criminal trial and would, if it stands, commit the resources of this court and the government to a lengthy retrial. The government contends that neither the law nor the interests of justice are served by a new trial.

If a new trial is compelled by law, this case presents a bizarre situation. Here the movants, through competent and skilled counsel, sought the discharge of a juror for tactical reasons over government objection, waited for verdict, and [1330] upon conviction alleged reversible error. The law does not require this illogical result, and the court's ruling is clearly erroneous: (1) rule 23(b), F.R.Crim.P., was expressly complied with on June 10, 1974, by counsels written stipulation: (2) *Henry v. Mississippi*, 379 U.S. 443 (1965) and *Winters v. Cook*, 489 F.2d (5th Cir. 1973) are binding precedent which conclusively establish a waiver by counsel on August 12 that bars movants' attack on the 11 juror verdict; (3) error, if any, falls within the doctrine of invited error, further precluding movants on this issue; (4) error, if any, was harmless under rule 52(a); and (5) the plain error rule is not invoked where competent counsel not only deliberately failed to object as a part of trial strategy, but affirmatively sought the juror's discharge.

Additional issues which may have entered into the court's decision to order a new trial, similarly, are without substance. The Mann charge does not require a reversal where the movant's objective conduct is in issue as much as their subjective intent; and, also, where the curative instructions approved in *United States v. Duke*, *infra*, were given to the jury. A recent decision banning the Mann charge under any circumstances is now under en banc reconsideration, and, if it stands, will be applied only to charged given subsequent to its effective date. The business records of the movants which were withheld are not material within the meaning of *United States v. Agurs*, *infra*, and because their only value potentially lost was in the nature of impeachment, the higher standards of *Garrison v. Maggio*, *infra*, renders this contention meritless.

[1331] FACTUAL SUMMARY

Jury selection commenced on June 10, 1974, ending that day with the swearing of 12 jurors and 2 alternates. After the completion of the voir dire but before the panel was selected, a written stipulation waiving the requirement of 12 jurors was signed by counsel for all parties, and approved by the court. This stipulation was read in open court without objection by the movants.

The waiver question had initially been raised by the court on June 3 at a pre-trial conference attended by all counsel and movant Spiegel. (Tr. 50). Defense counsel stated that they wished to defer decision until viewing the jury in order to properly exercise their judgment and skills on behalf of their clients.

Voir dire of the panel was thorough (Tr. 33-119). Following voir dire, defense counsel, at side-bar, requested additional peremptory challenges. At that point the court again raised the matter of waiver. Movants' counsel were unequivocal: "The defendant Spiegel will waive", Mr. Garland stated; and Mr. McGuigan assured the court movants Holloway and Perkins would waive the requirement of a twelve man jury in case it became necessary by reason of "[s]ickness overnight or accident or whatever happens." (Tr. 120).

The ensuing colloquy (Tr. 120-127) reveals that defense counsel waived a 12 person jury in order to obtain additional peremptory challenges. The court granted five additional peremptory challenges based upon the waiver. Counsel for Spiegel requested that alternates be selected, notwithstanding the waiver, as a matter of preference, "not that we would move for a mistrial because we were absent one." (Tr. 122). The court agreed, noting although all parties waived a jury of twelve

persons, two [1332] alternates would be carried as insurance since it was desirable to have twelve. (Tr. 125). The net result of the bench conference was that the defendants gained five additional peremptory challenges in exchange for their waiver.

Prior to actual juror selection, a recess was taken. Defense counsel with their clients jointly discussed the best tactical means of using their fifteen peremptory challenges. Counsel agreed that trading the waiver, representing only a possibility, for the certainty of five additional challenges was in the best interests of their clients.

Following the selection of twelve jurors and two alternates, a written stipulation waving the requirement of twelve jurors was signed by counsel in open court in the presence of their clients. After the government executed its consent, the written stipulation was approved by the court, and promptly read in open court:

> The court has received and approved the waiver of an alternate juror and the agreement to proceed with less than twelve in the event of necessity. (Tr. 133).

No objection was raised, and movants' counsel assured the court that the jury could be sworn.

During the first week of trial facts were presented to the court regarding two jurors causing their discharge under the discretionary authority conferred in rule 24(c). A mistrial was considered but rejected in part due to potential jeopardy problems. Both alternates were made regular jurors and all parties were aware that from June 13 only twleve jurors were in the box. Thereafter, twelve jurors continued to hear the evidence through August 9, nine weeks after the trial began.

The trial had been long and, like many fraud cases involving a great number of documents, tedious. Signs of the jury's restlessness and impatience were noted. The government's case [1333] absorbed seven weeks and was not notable in the speed and smoothness of its presentation. After a one-week recess, the defense case began on August 5. It is clear that the defense hoped to benefit in the eyes of the jury from a quick, cogent presentation, avoiding the delays that had plagued the government's case. Understandably, this demonstration of concern for the jurors, who initially understood that the case would last 3 or 4 weeks, was a strategy designed to benefit their clients.

By Friday, August 9, movant Spiegel's case was completed but for his cross-examination. It was requested by Mr. Garland that the trial run late, through 9 p.m. if necessary, so that the government would complete Spiegel's cross-examination. This request was denied and the trial recessed for the weekend with movant Spiegel on the stand.

The following Monday, juror Suzanne Silver did not report due to an illness. Prior to the judge's arrival in the courtroom, his deputy clerk advised counsel and the parties of the circumstances. The matter was the subject of considerable discussion before the judge took the bench. Attorney Tate, who arrived in the courtroom somewhat late that morning but prior to the judge, testified that a "consensus" among the defendants and defense counsel had already formed when he arrived.

Attorneys Garland and McGuigan believed the missing juror was not sympathetic to the defense. McGuigan believed that none of the female jurors with the possible exception of one was leaning in the direction of the defendants. Attorney Tate recalled that juror Silver had been "unsmiling". Attorney Garland had a specific problem not shared with co-counsel: his client was on the witness stand and a possible delay would

expose his client to a more intensive cross-examination. All defense counsel shared the desire to present their cases quickly and without delay, hoping [1334] to gain the jury's favor. These tactics and considerations were weighed and discussed among defense counsel and their clients on the morning of August 12.

Attorney Garland suggested to McGuigan that they get rid of the juror. Tate agreed, as did his client. McGuigan informed his clients of the agreed-upon strategy and movant Holloway replied, "you're the attorney". Counsel specifically discussed and considered that the discharge of Ms. Silver would reduce the jury to 11.

The judge made an announcement regarding the missing juror; it was explained there was no certainty when the juror might return. In accord with the agreed-upon strategy, all defense counsel in the presence of their clients requested that the juror be discharged and that the trial proceed with the remaining 11 jurors. (Tr. 3). The government objected to the dismissal of juror Silver who was believed to be friendly. However, the court excused the juror, announcing its decision in the presence of and without objection by movants Spiegel, Holloway, or Perkins. (Tr. 4) The jury was called into the courtroom and the judge, again in the presence of the movants, stated that juror Silver had been excused and that trial would proceed with 11 jurors. (Tr. 9). No Objection was voiced by the movants at any time to the discharge of Ms. Silver and proceeding with 11. It was apparent that the court had resolved the issue as requested by the defendants, and against the request of the government.

During a morning recess, movant Spiegel commented to Mr. Tate that he was glad that Ms. Silver had been discharged describing her crudely as a "shit", terms so explicit that Tate still recalls the incident. Also that morning, Attorney Richard

C. Freeman, II, overheard movant Spiegel relating that things looked good and that the defense had gotten rid of a hostile juror.

[1335] The defense cases of McGuigan and Tate were put in and completed by the following day. After brief rebuttal testimony on Wednesday morning, the case was argued to the jury the remainder of that day. Following the court's charge Thursday, the jury deliberated until Saturday afternoon, August 17, when the verdicts were returned.

At some point between the discharge of juror Silver and the return of the jury verdict, movant Holloway informed Ed Carroll, a co-defendant who had plead guilty, that however the jury decided the issue the defendants could not lose since the trial judge had committed reversible error in excusing the juror. Carroll relayed this information to his attorney, Frank Hester.

The jury returned verdicts on August 17 convicting movant Spiegel on 30 counts of mail fraud, every substantive count submitted for their consideration; movant Holloway was convicted of 25 counts of the same violation; and movant Perkins was convicted on one count. Six days later movants filed sketchy motions for new trial with requests for time extensions to amend and amplify the post trial motions after completion of the transcript. These motions were granted. The expanded motions were filed in June, 1976.

The first time that the issue of the 11 juror verdict was raised to the court was in December, 1975, on behalf of movant Spiegel, about sixteen months after the verdicts. Testimony from the February, 1977, evidentiary hearing establishes that movant Spiegel discovered this legal issue in May, 1975, while searching the annotations in the Federal Rules of Criminal Procedure. Movant Spiegel testified that he became interested in the rule 23 problem, contacted his trial counsel, shepardized

cases cited in the annotations, and read every case which was cited in the December, 1975, letter brief to the court.

Thus, the facts indicate that while movants' Holloway and Perkins believed before verdict that the court had committed error [1336] in discharging the 12th juror, by virtue of their counsel's prior experience with a similar question, movant Spiegel raised the issue wholly as an afterthough, not because he felt wronged by the discharge of juror Silver, or by the tactical choice made on his behalf by his counsel, but resulting from his systematice fine-combing of the procedural rules to find error in the record.

[1337] THE NATURE OF THE RIGHT

The requirement of 12 jurors in federal criminal trials is solely a procedural right granted to an accused by Rule 23(b). The Supreme Court in *Williams v. Florida*, 399 U.S. 78 (1970) has completely removed the constitutional base previously thought to support the requirement, holding:

> the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.' *Id.*, at 102.

Therefore, the Court held that a 12-man panel is not a necessary ingredient of "trial by jury" contemplated by Article III, Section 2, Clause 3, and the Sixth Amendment of the Constitution of the United States.

The *Williams* decision in 1970 directly overruled contrary holdings in *Thompson v. Utah*, 170 U. S. 343 (1898) and *Patton v. United States*, 281 U.S. 276 (1930) which had placed the requirement of 12 on an equal constitutional plane with the requirement of trial by jury. For example, in *Patton*, the Court stated:

> [W]e must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing. *Id.*, at 290.

This reasoning is no longer valid. Since *Williams* it is clear that while the right to a jury itself is a fundamental constitutional right, the right to 12 jurors is a mere procedural right codified in Rule 23(b), carried over from the common law, and based upon historical accident.

[1338] *Patton's* erroneous equation of the right to jury trial and the right to a jury of 12 led the Court in 1930 to erroneously treat the waiver requirements for both rights as identical. The waiver language in *Patton* remains authoritative only insofar as applied to trial by jury. The Court of Appeals decisions relied upon by movants, [1] however, continue to cite *Patton* regarding consent by an accused to a jury of less than twelve, without reference to *Williams*. In this regard movants' entire argument is based upon a discredited premise.

Rule 23(b) Permits a Stipulation to be Executed by Counsel on Behalf of his Client.

The waiver of an accused's rights is often executed by counsel. Ordinarily, a defendant in a criminal case is bound by the acts or non-action of his counsel unless misconduct amounting to a breach of his legal duty to faithfully represent the defendant's interest is alleged and proved. *Camp v. United States*, 352 F.2d 800 (5th Cir. 1965); and *Kennedy v. United States*,

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1 *United States v. Smith*, 523 F.2d 788, 791 (5th Cir. 1975); *United States v. Guerrero Peralta*, 446 F.2d 876, 877 (9th Cir. 1971); and *United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974).

259 F.2d 883 (5th Cir. 1958). Only the most inherently personal and fundamental rights cannot ordinarily, be waived by counsel. Such rights include: pleading guilty which waives the right to trial, to confrontation, and against self-incrimination; and consenting to a bench trial, which waives the right to trial by jury. [2]

[1339] Where these inherently personal and fundamental rights are involved the rules expressly state that the defendant personally waive them. Rule 11 requires that an accused wishing to plead guilty be personally addressed by the court. Similarly, rule 23(a) provides that the *defendant* waive in writing the right to trial by jury. By contrast the procedural requirement of 12 jurors in rule 23(b) can be waived by a written stipulation among the *parties*. There simply is no language requiring that this procedural right be waived personally. The drafters of the rules distinguished among the relative rights of an accused and expressly required a personal waiver for only the most fundamental. An identical distinction was drawn in the waiver of rule 23 rights by its drafters, and in constitutional interpretation by the Supreme Court in *Williams*. Had the drafters intended to elevate the standards for a rule 23(b) waiver to the level set out in rules 11 and 23(a) it would have expressly done so.

The Fifth Circuit noted the distinction in rule 23 between waiver of an entire jury and any number of the 12 jurors in *Horne v. United States*, 264 F.2d 40, 42, n.3 (5th Cir. 1959). Judge Brown in 1959 believed the courts were constitutionally precluded from giving effect to any intended distinction in waiver standards, citing the quoted passage from *Patton* on page 9 of this brief. Since 1970 no constitutional prohibition

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2 In *Winter v. Cook*, 489 F.2d 174, 186 (5th Cir. 1973) the Fifth Circuit left open the possibility that even these fundamental rights may in some circumstances be waived by an attorney for his client.

exists and now the express distinction made in rule 23 in the waiver requirements for two separate rights should be applied.

[1340] The existence of a written stipulation factually distinguishes this case from those previously cited to the Court. Here, there was express compliance with Rule 23(b), and no reason exists not to apply the ordinary rule making an attorney's stipulation on procedural matters, absent fraud or breach of legal duty, binding on his client. The written stipulation executed by movants' counsel was a deliberate action. It occurred during litigation and was taken by competent, retained, criminal counsel after conscious deliberation for the best interests of their clients. See *In re Level Club*, 46 F.2d 1002 (S.D.N.Y.). The stipulation was signed only after counsel viewed the entire panel of jurors and learned they could obtain five additional peremptory challenges in exchange for the waiver. Counsel had apparent authority to bind their clients on this procedural matter, and when the stipulation was read in open court without objection by movants, this apparent authority was ratified by the clients.

The only case relating to the binding effect of counsel's written Rule 23(b) waiver supports the government's argument. *United States v. Pacente*, 503 F.2d 543, 551-553 (7th Cir. 1974). [1] There, prior to testimony, counsel for all parties signed and filed a written stipulation. The defendant did not sign the agreement and nothing in the record [1341] otherwise indicated he agreed to it. During deliberation the father of one of

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1 A recent case, *United States v. Stolarz*, 550 F.2d 488, 493 (9th Cir. 1977), also upheld a 11 juror conviction on appeal where a written stipulation had been filed prior to testimony. However, the defendant failed to designate the stipulation as part of the appellate record, so the Ninth Circuit refused to consider attacks on the written stipulation.

the jurors became seriously ill, and information was received that he was not expected to live. The judge, without consulting counsel, excused the juror. Upon notice of the judge's action the following morning while deliberation of the 11 jurors continued, defense counsel objected in open court, notwithstanding the stipulation, on the ground he had not been notified. The defendant was silent during this colloquy. Later, the judge informed counsel he planned to use a modified Allen charge, and, if no verdict was then forthcoming, discharge the jury. Defense counsel objected to giving the Allen charge and to discharging the jury. Again, defendant remained silent. Thereafter, defendant was convicted by an 11 person jury.

On direct appeal, defendant contended that he had been deprived of his constitutional right to a jury trial, and that the stipulation signed by counsel was not binding absent his agreement in the record. The conviction was affirmed, the court of appeals holding on the factual record before it that the defendant was not in a position to repudiate his attorney's authority to agree to reduction in the size of the jury (Pacente, supra at 552).

> Nothing in Rule 23(b) suggests that counsel's signature on a stipulation for a reduced size of jury does not bind the party he represents if the record fails to show that the party authorized counsel to stipulate. During the progress of a trial, it is ordinarily presumed that an attorney of record has authority to bind the party he represents as to matters of procedure. 7 Am. Jur. 2d 120, Attorneys at Law §121. Although policy considerations may cause courts to forego reliance on that presumption as the matter stipulated rises in stature, the Supreme Court has "squarely rejected the argument that . . . any waiver of constitutional rights [is] ineffective unless deliberately made and expressly approved by the defendant." United States ex rel. Allum v. Twomey, 484 F.2d 740, 745 (7th Cir. 1973).

[1342] The court observed that the absence of the defendant's personal consent on the record had been rejected by the Fifth Circuit on both collateral attack and on direct appeal in 11 juror cases.

The facts here are even stronger for binding movants to the stipulation signed by their retained counsel on June 10. The side-bar colloquy shows the focus of counsels' attention on the waiver issue; it further shows the tactical decision counsel exercised on behalf of their clients in order to obtain additional peremptory challenges. Finally, this record shows the stipulation was announced in open court without drawing any objection from movants. On this record, the court ought to find that the movants are in no position to repudiate their attorneys' authority to enter into the rule 23(b) stipulation, applying the general rule that an attorney of record during the course of a trial has authority to bind his client as to matters of procedure. This is especially for application where, as here, there is no suggestion of fraud, incompetence, or negligence on the part of retained counsel. [1]

[1343] MOVANTS ARE BOUND BY COUNSELS' DELIBERATE WAIVE OF THEIR RIGHT TO A JURY OF TWELVE AS A CONSCIOUS PART OF TRIAL STRATEGY.

Counsels' deliberate choice of strategy in seeking the discharge of juror Silver on August 12 amount to a waiver of the right to a jury of twelve binding on movants. Absent exceptional circumstances, trial strategy adopted by counsel, even without consultation with his client, deliberately forgoing specific rights, constitutional or otherwise, will preclude the accused from later asserting these rights. *Henry v. Mississippi*,

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1 cf: *Brady v. United States*, 397 U.S. 742 (1970); and *McMann v. Richardson*, 397 U.S. 759 (1970).

379 U.S. 443 (1965). The deliberate by-passing of movants' right to a jury of twelve as part of a conscious trial strategy bars assertion of that right in their post-trial attack on the verdict.

The movants cannot demonstrate the exceptional circumstances that would enable them to escape the general rule that personal waiver is not required. Those circumstances justifying a requirement of personal waiver have been identified in *Winters v. Cook*, 489 F.2d 174, 178 (5th Cir. 1973) to be: (1) where there is evidence of fraud, or gross negligence or incompetence on the part of defense counsel; and (2) where an inherently personal right of fundamental importance is involved.

The lack of a request by movants counsel for a recess to enable to the 12th juror to return, or for a mistrial because of her absense, was not due to inadvertence, misunderstanding, or oversight. Counsel made a deliberate decision, prompted by litigation strategy, to proceed to verdict without the twelfth juror, Ms. Silver. Even assuming the decision was made by counsel without prior consultation with movants, the [1344] deliberate by-passing of their right to a jury of 12 as a part of trial strategy is a waiver of the rule 23(b) right binding on them. *Henry v. Mississippi*, 379 U.S. 443, 451 (1965).

The reasons for the strategic move clearly emerge from the facts. Defense counsel did not want juror Silver, they believed she was leaning toward the government. In any event, they did not want a delay which would have resulted if they insisted on a full jury of twelve. All defense counsel wished to conclude as quickly as possible fearing jury restlessness and impatience. Certainly, counsel for Spiegel did not want further delay while his client was on cross examination. Finally, defense counsel had no desire to ask for a mistrial because they all believed they had a chance for acquittal. After ten weeks of trial they wished to take a shot at the jury, and they believed their chances were improved without Ms. Silver on the panel. Under the principals

set forth in *Henry v. Mississippi, supra*, 449-452, the action taken by competent, experienced, criminal counsel on August 12, affirmatively seeking the discharge of the 12th juror as a part of trial strategy was a deliberate by-passing of movants' procedural right under rule 23(b), precluding its assertion as error after verdict.

The waiver question in *Henry* involved the constitutional protection against unreasonable searches. During Henry's trial a police officer testified without objection regarding a search he had conducted of the accused's car, which corroborated [1345] prior victim testimony. Later, Henry sought to attack his conviction, alleging the officer's testimony was tainted by an illegal search. The Supreme Court remanded the case for an evidentiary hearing to determine if Henry knowingly waived the Fourth Amendment claim when his attorney did not make objection contemporaneously with the admission of the illegally seized evidence. The remand was prompted because the record indicated a possibility that Henry's counsel had deliberately refrained from objecting to the officer's testimony as a part of trial strategy. From the evidence possible reasons for this tactic may have been to allow the complaining victim and the police officer to give consistent testimony, and then discredit both with a surprise defense witness; or, by delaying objection, the defense might have hoped to invite error and lay the foundation for a subsequent reversal. If either reasons motivated counsel, the Supreme Court stated that counsel's deliberate choice of strategy even without prior consultation would bind his client, amounting to waiver of Henry's Fourth Amendment right. Absent exceptional circumstances, the Court held that trial strategy adopted by counsel without prior consultation with an accused bars later assertion of his constitutional claims.

The general rule is that, in the area of trial tactics and strategy, personal waiver is not required. *Henry* requires a determination whether the circumstances of a particular case

are in the *exceptional* category from which the bar of waiver, created by the good faith actions of a criminal defendant's [1346] attorney, has been lifted. Two broad categories of "exceptional circumstances" are found in the case law: first, where there is evidence of fraud, or gross negligence or incompetence on the part of the defendant's attorney; and second, where an inherently personal right of fundamental importance is involved. *Winters v. Cook*, 489 F.2d 174, 178 (5th Cir. 1973).

The waiver by counsel of movants' right to a jury of twelve does not fit within either of the exceptional circumstance categories which require personal waiver. As to the first category, the record is clear that counsel conscientiously represented movants to the best of their considerable abilities. No allegations have been made of fraud, incompetence, or negligence of counsel in seeking to discharge juror Silver. Neither could such an allegation, if made, have merit since the record fully supports the wisdom and soundness of counsel's considered strategic decision.

The right to twelve jurors also does not come within the second category of exceptional circumstances. It is not such an inherently personal fundamental right that it can only be waived by the defendant not by his attorney. These rights were identified by the Fifth Circuit in *Winters v. Cook, supra*, at 179, to include pleading guilty (waiving numerous constitutional rights), waiving trial by jury, waiving appellate review, and waiving the right to testify personally. The right to twelve jurors is not listed in this category. In *Winters* it was held that the right to be indicted or tried by a constitutionally composed jury is not one of [1347] the rights traditionally considered so inherently personal that only the defendant may waive it. Previously, in *United States v. Harpole*, 263 F.2d 71, 81 (5th Cir. 1959) the Fifth Circuit had stated the right to a jury from which one's race had not been systematically excluded was

more fundamentally important than the "mere negative absence of one of the twelve jurors considered in *Patton v. United States*", supra. Hence, the Fifth Circuit, even before *William v. Florida*, supra, denigrated the fundamental importance of the 12 juror right, placing it below that "exceptional" level necessary to fit within the second category requiring personal waiver. Since *Williams*, the Supreme Court has placed this right outside the Constitution, characterizing it as procedural right carried over from the common law as a mere historical accident.

The facts in *Winters v. Cook*, *supra*, involve a waiver by counsel of his client's constitutional right not to have blacks systematically excluded from his grand and petit juries. Winters' counsel was privately retained, competent, and well-versed in the defense of murder charges. Counsel was specifically aware of the constitutional attack on jury composition, but without consulting his client decided to use it as a bargaining tool to obtain a recommendation for life imprisonment rather than death as punishment for the crime. The appellate court found on the facts that a waiver had occurred where competent counsel familiar with criminal defense work deliberately refrained from making a known constitutional objection for strategic purposes. The effect of the waiver was not vitiated by counsel's failure to consult with his client.

[1348] The circumstances here are even stronger than those in *Winters* justifying a waiver by counsel. Here counsel did not merely fail to make an objection, they affirmatively sought removal of the juror. This action was taken in the courtroom in the presence of movants, rather than in the prosecutor's office without the clients' knowledge. The factual hearing in February established movants Spiegel and Holloway expressed approval of the action immediately afterwards, if not before, unlike Winters who never knew of his attorney's decision. And, finally, movants here make no attack on the good faith or competence of their counsel.

There has never been a suggestion even to this date that the movants desired Ms. Silver to be retained. Movants argument is not with counsels' decision to seek the discharge of the twelfth juror, it is with the verdict itself. As stated in *Winters*, at pp. 177-178:

> Our Constitution has been held to afford all criminal defendants the right to counsel. The cardinal precept upon which the establishment of this right is predicated in that most defendants are untutored in the law and are unqualified to conduct their own defense. It would be incongruous to reflexively allow a defendant such as Winters to void his conviction when his privately-employed lawyer did what he was retained to do – use his skill and knowledge of the law to further the best interests of his client – because the lawyer did not first reason out his every action with his client and obtain his knowing agreement.

Other circuits have similarly ruled that a client is not entitled to "retrial by hindsight" in escaping the tactical trial decisions made by competent counsel. *Kuhl v. United States*, 370 F.2d 20 (9th Cir. 1966); and *United States ex rel Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973).

[1349] ANY ERROR COMMITTED IN DISCHARGING THE TWELFTH JUROR WAS INVITED BY MOVANTS' COUNSEL.

Trial error was not committed in the discharge of juror Silver under the express terms of Rule 23(b) because of the June 10 stipulation. Further, the facts show that the movants have waived their right and are barred from asserting error, since their attorneys failed to object to the discharge on August 12, and assert their rule 23(b) right as part of deliberate trial strategy. More than a deliberate failure to object occurred on August 12; defense counsel affirmatively urged the court to

proceed without the twelfth juror. This was done in open court in the presence of all movants over the objection of the government. The doctrine of invited error mandates rejection of the attack.

The contentions taken by movants regarding the discharge of juror Silver is irreconcilable with the position adopted by defense counsel during trial. Counsel not only failed to object but clearly invited the procedure now being condemned:

> Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be in their best interest, they cannot be permitted at a later time, after a decision has been rendered adverse to them, to obtain a retrial according to procedure which they have fully discarded and waived. *Carruthers v. Reed*, 102 F.2d 933, 938 (8th Cir. 1939), *cert. denied*, 307 U.S. 643.

This is an instance of error invited by movants' counsel and cannot be raised in a post-verdict attack. *United States v. Lewis*, 524 F.2d 991, 992 (5th Cir. 1975); *United States v. Pentado*, 463 F.2d 355 (5th Cir. 1972); and *United States v. Dadurian*, 450 F.2d 22 (1st Cir. 1971).

[1350] THE DISCHARGE OF JUROR SILVER UPON REQUEST OF MOVANTS' COUNSEL WAS, AT MOST, HARMLESS ERROR.

Rule 52 controls a trial court reviewing allegations of error raised in post trial motions. *United States v. Goldstein*, 386 F. Supp. 833, 842 (D.C. Del. 1973); and *United States v. Stoehr*, 100 F. Supp. 143 (D.C. Pa. 1951), *aff'd* 196 F.2d 276, *cert. den.*, 344 U.S. 826. Here, if any error was committed in discharging the juror, it must be deemed harmless error within rule 52(a) under the facts in this record. However, since no

objection was raised to the court's action, movants must hurdle the higher barrier of rule 52(b)'s plain-error provision. Movants clear neither barrier.

The harmless error test for an alleged non-constitutional error is, upon considering the entire proceedings, including the erroneous action, whether the judgment was substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750, 764-765 (1959); *United States v. Harbolt*, 491 F.2d 78 (5th Cir. 1974). The purpose of the rule on its face is a plain admonition not to be technical where the technicality does not really hurt the party asserting error.

The Supreme Court has held that even constitutional errors are to be guaged by rule 52(a) in order to block setting aside convictions for errors or defects that have little, if any, likelihood of having changed the result of the trial. *Chapman v. California* 386 U.S. 18, 24 (1967). Recently, the Fifth Circuit in *Chapman v. United States*, 547 F.2d 1240 (5th Cir. slip opinion dated March 3, 1977) applied the harmless error rule to a trial error affecting use of an accused's silence following arrest and Miranda warnings to impeach his exculpatory testimony at trial.

[1351] Any error occasioned on August 12 must be considered harmless here where the court exercised its discretion in favor of movants' interests as conceived by their competent counsel. The question of juror Silver's likely impact on the verdict has already been considered by counsel at the time she failed to report. Had she been viewed as friendly or helpful to movants, their retained counsel having observed the jury over ten weeks time would have been sensitive to keeping her on the jury. Movant Spiegel was convicted on every substantive count; movant Holloway was convicted on 25 out of the 30 substantive counts, and the evidence as to the deliberate falsehoods made by movant Perkins via telephone as a paid "singer" was

overwhelming. Viewed in this light, clearly any error here must be termed harmless.

[1352] MOVANTS CANNOT INVOKE THE PLAIN ERROR RULE WHEN FAILURE TO OBJECT IS DELIBERATE TRIAL STRATEGY.

The plain error rule must be applied in order that movants' to object at trial does not preclude raising the issue. Rule 52(b) invoked in limited situations, however, to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process. *Marshall v. United States*, 409 F.2d 925, 927 (9th Cir. 19___. It is appropriately applied when the court believes that a party should not be unalterably and unfairly prejudiced by inadvertent or ingorant mistakes of his counsel. Significantly, the plain error rule is not applied where the failure to object may have been deliberate and in furtherance of legitimate trial tactics. *Ibid.*

Marshall, supra, involved the testimony by a police officer regarding a conversation of the accused and an informant which was electronically overheard. The testimony was not objected to by the defendant. On appeal it was contended that the testimony should have been excluded as the product of an illegal search. From the record it did not appear that appellant was a victim of miscarried justice; further, indications suggested defense counsel deliberately chose not to object to the officer's testimony as a tactical matter, hoping to discredit both the informer and the officer with a defense witness to whom the officer allegedly admitted hearing very little of the surveilled conversation. It also appeared that only by risking the adverse effect of the officers testimony could counsel discredit the government's chief witness, the informant. Concluding that the failure to object was deliberate trial strategy by Marshall's attorney, the court held rule 52(b) is not invoked in that situation.

The Fifth Circuit has applied a similar rule in *United States v. Hattaway*, 416 F.2d 1178, 1180 (5th Cir. 1969). There, the defense attorney failed to object when the government called rebuttal witnesses to (illegible) conversations which the defendant had denied on cross-examination. [1353] Possible defense strategy may have been to allow the rebuttal witnesses' testimony, hoping it would weaken the government's strong direct case. Where in retrospect, it may have been poor strategy, to allow initial objection after verdict would be to encourage the strategy of withholding objections while creating reversible error. The plain error rule is not appropriate where the failure to object may have been deliberate as a considered part of trial strategy.

Johnson v. U.S., 318 U. S. 189 (1943) involved a trial error of significant proportions where the plain error rule and the doctrine of invited error were both examined. The defendant successfully invoked his privilege against self-incrimination on an uncharged offense during cross-examination. In closing argument the prosecutor repeatedly commented on the defendant's assertion of his privilege and argued that his guilt of the charged offense could be inferred from it. Defense counsel objected; then later withdrew the exception and agreed to the court's treatment of the matter. The Supreme Court found that the trial court had committed error in granting the claim of privilege and allowing it to be used against the accused to his prejudice. However, by withdrawing his exception to the prosecutor's comment and acquiescing in the court's handling of the matter on charge to the jury, Johnson waived his objection. The plain error rule was not for application where more than inadvertance or oversight was involved: namely, silent approval of the course taken by the court, accompanied by an express waiver of a prior objection. Where the trial error committed by the court was induced by defense counsel and the failure to object was not mere inadvertence but conscious and deliberate, and the trial court was led to believe counsel was satisfied, the plain error rule cannot be applied.

> [1354] Any other course would not comport with the standards for the administration of criminal justice. We cannot permit an accused to elect to pursue one course at the trial and then, when that has proven to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced. *Johnson v. United States, supra* at 201.

It is obvious that movants cannot invoke the plain error rule under the facts of this record.

[1355] *UNITED STATES V. SMITH* DOES NOT REQUIRE A NEW TRIAL

The latest fule 23(b) decision in this circuit, *United States v. Smith*, 523 F.2d 788 (5th Cir. 1975), upholds a conviction by a jury of eleven. *Smith* found an intelligent and personal consent to a waiver of twelve jurors by the defendant in the absense of a personal stipulation, oral or written, in the record, and over his objection at the time the twelfth juror was discharged. Drawing inferences from the record, the court concluded that Smith had consented to a rule 23(b) stipulation at the start of trial and that precluded his objection when the juror was discharged. *Guerro-Peralta, supra,* and *Taylor, supra,* which had reversed eleven juror convictions, were distinguished.

The Fifth Circuit has rejected the holding in *Peralta* that "[e]xpress consent given orally by the defendant personally and appearing on the record . . . as a minimum, must appear."

That legal view would have compelled reversal in *Smith, Beatty v. United States,* 377 F.2d 181 (5th Cir. 1967), and *Horne v. United States,* 264 F.2d 40 (5th Cir. 1959).

In contrast, the Ninth Circuit in *Peralta* rejected the legal conclusion that the defendant's express consent to a rule 23(b) waiver need not appear directly in the record, which is the law in the Fifth and Seventh Circuits. 1/

Peralta suffers two major weaknesses. First, its main thesis, that a rule 23(b) waiver must encompass "the express and intelligent consent of the defendant," is based upon *Patton* and the pre-1970 cases that followed it. The *Patton* decision in 1930 applied the standard quoted in *Peralta* for both waiver of jury trial and a jury of twelve, under the mistaken belief that both rights were constitutionally equal and indistinguishable. *Peralta,* decided one year after *Williams v. Florida, supra,* ignores the destruction of the "twelve juror" half of the *Patton* constitutional equation.

[1356] The second defect has equal impact in this circuit. Noting the *Horne* and *Williams v. United States, supra,* decisions are contrary, a weak attempt was made to distinguish them on the ground they arose on collateral attack. Judge Brown's careful distinction in *Horne* between the consideration of a 23(b) waiver claim on collateral attack and direct appeal was wholly misunderstood. 2/ *Horne* did not hold, as indicated in *Peralta,* that an alleged failure by the defendant personally to

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1/ *United States v. Smith, supra; Beatty v. United States, supra. Horne v. United States, supra; United States v. Pacente,* 503 F.2d 543 (7th Cir. 1973); and *Williams v. United States,* 332 F.2d 36 (7th Cir. 1964).

2/ *United States v. Guerro-Peralta, supra,* at 877, ftn. 3.

stipulate is an error reached only on direct appeal. That question was in fact reached by the Fifth Circuit in the §2255 proceeding. What was not considered, as Judge Brown carefully pointed out, was the legal effect of the lack of writing, a technical imperfection. That question must be raised on direct appeal; whereas, in a collateral proceeding such a procedural defect is relevant only insofar as there is a question whether an oral stipulation has been reached. No such issue existed in *Horne*, where, as here, the attorneys for all parties had stipulated. The question remained whether the clients were bound. The technical lack of a written stipulation was not considered in *Horne* because of the nature of a collateral attack. 3/ But the guts of the waiver issue – i.e. the effect of petitioner's failure to personally stipulate – was squarely met, and the direct misstatement of this fact in *Peralta* is false and misleading.

No valid distinction can be drawn between the waiver standards applied to a rule 23(b) question on direct appeal and collateral attack, beyond that made by Judge Brown in *Horne*. It is simplistic and intellectually dishonest to rely on the obvious distinction of form without probing the substance and meaning of the difference. 4/

To these deficiencies in *Peralta*, it might be added that no mention was made of _____ [1357] *Beatty v. United States, supra*, a case arising on direct appeal upholding counsel's waiver of an accused's right to a jury composed of

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3/ Here, although on direct appeal where presumably movants could raise such a technical non-compliance, a written stipulation was filed. As in *Horne* the question is whether the attorneys' stipulation binds the movants.

4/ The failure in *Smith* to treat this issue weakens the force of that opinion.

twelve persons. In seeking to distinguish the Fifth and Seventh Circuits' rule allowing attorneys to stipulate to juries of less than twelve and in missing the dismantling of *Patton's* thesis by the Supreme Court, *Peralta* does not comnend itself as legal precedent. Certainly in this circuit, *Peralta* deserves no deference and little respect.

The Sixth Circuit's reversal in *United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974) of an eleven-juror verdict adopts the *Peralta* view that the defendant's express consent must appear from the record. There is neither apparent recognition of nor effort to distinguish the contrary rule in the fifth and seventh circuits. As in *Peralta*, this 1974 decision fails to confront the loss of *Patton's* rationale for a jury of twelve in applying the pre-*Williams* standard.

Smith plainly does not adopt the rule prevailing in the ninth and sixth circuits. It affirms the conviction under review in spite of *Peralta* and *Taylor*. The record appears to have been neither carefully briefed nor researched. Rather than exhibiting careful legal analysis reflective of existing precedent, the decision appears to be a rationalization of a judicial unwillingness to allow the appellant to trifle with the processes of criminal justice.

After identifying the rule 23(b) problem, the court refers to the "rarity of judicial precedent" on this point. The only cases cited in the text are *Patton*, *Peralta*, and *Taylor*. *Horne* is mentioned only in a footnote, apparently reflecting a dim awareness that an accused's personal consent had not been required in that decision. There is no indication that the writer ever read Judge Brown's opinion or grasped the significance of his distinction between collateral and direct review. In stating that the rule 23(b) waiver had never been previously considered on direct appeal in this circuit, the writer overlooked *Beatty*. The Seventh Circuit's decisions under §2255, *Rogers v. United*

States, 319 F.2d 5 (7th Cir. 1963) and *Williams v. United States*, *supra*, [1358] do not appear in the opinion. Even more significant is the writer's unawareness of *Pacente*, a 1974 decision on direct appeal which, in part, relied on decisions of the Fifth Circuit. Furthermore, a fatal error in analyzing the waiver standard was committed. The writer relies on *Patton* and, amazingly, concludes that its mandate flows from the Constitution itself. Since the writer prefaced his opinion by noting the rarity of judicial precedent in the 23(b) area, it may be safely concluded that the omission of the 1970 Supreme Court decision in *Williams*, as well as the fifth and seventh circuits opinions previously cited was not intentional.

Smith cannot be relied upon to require a new trial. It is not an express overruling of *Horne;* rather, it is a rationalization affirming conviction in the teeth of *Patton*, *Peralta*, and *Taylor*. Two of the judges from the *Horne* panel are still active, including the present chief judge of this circuit. *Smith* is at most a glancing blow to *Horne* and *Beatty*. The district court ought not to grant a new trial so burdensome in its effect on this entire court, the bar, all civil and criminal litigants, and the public without clear indication that it is compelled by law. The Fifth Circuit, en banc if necessary, ought to rule on this question. All relevant authority should be placed before the court and a clear ruling obtained. Surely the issue is now crystalized and ready for resolution in the Court of Appeals. All the groundwork is done and no great amount of time will be expended in resolving this legal question. The government strongly believes its position will prevail and is fully prepared to vigorously present this case to the appellate courts. To grant a new trial with its attendent costs, solely on the basis of what the district court views as a close question of law is contrary to the interests of sound judicial administration and justice. That decision, with all appeal foreclosed, condemns all concerned, in the government's view, to an unnecessary and wasteful retrial.

[1359] THE COURT'S INSTRUCTION TO THE JURY REGARDING INTENT DID NOT PREJUDICE MOVANT SPIEGEL.

The instruction now asserted to be plain error was delivered to the jury on August 15, 1974 (Tr. 45). There was no objection as required by rule 30, Fed. R. Crim. P. Any error in giving the instruction did not affect the movant's substantial rights.

Unlike the situation in *Mann v. U.S.*, 319 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 986, movant Spiegel did not admit to all his objective conduct, as testified to by various government witnesses. As pointed out in the government's initial brief on this subject, movant Spiegel contested several instances of his alleged conduct. In *Mann*, the defendant admitted all conduct that the government sought to prove, leaving purely his mental state as the crucial issue. Here, the nature of the case and the issues in dispute alleviate the effect of the Mann instruction. *U.S. v. Jenkins*, 442 F.2d 429 (5th Cir. 1971).

A further distinction with *Mann* is in the curative instructions given in this case in the remainder of the charges that properly placed the burden of proof on the government. *U.S. v. Durham*, 512 F.2d 1281 (5th Cir. 1975). The jury was properly instructed that the burden is always on the government and never shifts to the accused. (Tr. 14-15, 52).

An identical instruction was given by this court six months after the charge now in issue. It was upheld in *U.S. v. Duke*, 527 F.2d 386 (5th Cir. 1976). There the only contested issue was whether a defendant with a prior conviction for a marijuana offense who testified that he had consciously picked up a vial, observed that it contained marijuana, and retained the vial, knowingly or intentionally possessed mairjuana. Important to the decision of the court was their determination of "the type

of case and nature of the evidence which had been presented to the jury". Viewed in the light of the *Duke* decision, the evidence in *Speigel, et al* clearly falls within the *Helms* objective category and the charge as given as a whole does not constitute plain error.

[1360] The recent decision of *United States v. Shilleci*, 545 F.2d 519 (5th Cir. 1977) does not require a reversal on the Mann instruction. In that case, unlike here, there was very little objective conduct on the part of the defendant. It further appears that the charge was submitted to the jury in writing for them to consider in their deliberations, suggesting a danger of undue emphasis to individual sentences and phrases rather than the overall effect of the charge. This possibility was increased because the jury was never instructed to consider the charge as an integrated whole. In reversing the conviction, the Fifth Circuit emphasized the uniqueness of the factual situation requiring that result. The facts are easily distinguishable from the case now under consideration.

A later case, *U.S. v. Chiantese*, 546 F.2d 135 (5th Cir. 1977), decided January 28, set forth a conclusive edict that use of the Mann charge would thereafter amount to reversible error, without exception. On March 28, 1977 the Fifth Circuit voted for an *en banc* rehearing on that case. Assuming the ruling is permitted to stand, it logically cannot be given retroactive effect. To do so would void convictions not only in this court but throughout the Fifth Circuit on a massive scale. Obviously, if the decision stands it will be given prospective effect only. The language used by Judge Brown plainly is intended to control the future action of trial judges throughout the circuit. Until the *en banc* decision the ruling in *Chiantese* can not be treated as final; in any event the decision should not be given retroactive application.

[1361] THE ABSENCE OF CERTAIN BUSINESS RECORDS FROM ROOM 532 BETWEEN JUNE 21 UNTIL JULY 31 DID NOT AFFECT MOVANTS' SUBSTANTIAL RIGHTS.

The records contained in Box No. 3 were primarily LCA business records created by the movants. From the time they were made in the course of business until they were received by the government on June 21, the movants had access to them. At most the facts show that the movants were deprived of access to the small number of records in that box for one month. These records apparently held little value since the movants made no specific request to the government for assistance in locating them.

This case does not present a violation of the rule in *Brady v. Maryland*, 373 U.S. 83 (1963), since the documents inadvertently not placed in Room 532 were the movants own business records. Further, these records were placed in the evidence storage room prior to the start of the defense case, and they were available for an introduction into evidence. In truth, these records were not exculpatory, but were cummulative of the other records reflecting the business activities of LCA. The only colorable deprivation movants can claim is that the absence of these items during the franchisees' testimony impinged on the defense effort to impeach them. A reading of the record shows that movants mounted vigorous attacks on all the victim witnesses, indicating that they had the practical use of the information reflected in the LCA business logs, if not the records themselves.

The case of *U.S. v. Agurs*, 427 U.S. 97 (1976) completely puts at rest any notion that a constitutional *Brady* violation has occurred. Agurs defines the showing of materiality that must be made to establish a constitutional violation in a case where the defense fails to make a specific request for the evidence allegedly withheld. Simply put, the withheld evidence

must create a reasonable doubt not otherwise present. The records in Box No. 3 fall far short of this standard since the records were available to the jury as the defense saw fit to introduce them. Recent decisions of the [1362] Fifth Circuit have held the Agurs test as controlling on Brady-type claims where the defense made no specific request for the "omitted evidence", *U.S. v. Washington*, 550 F.2d 320 (5th Cir, slip opinion dated April 11, 1977), and where the omitted information was already known to the defendants and was only of an impeaching nature. *U.S. v. Prior*, 546 F.2d 1254 (5th Cir., slip opinion dated February 14, 1977).

The only use lost for the records was to impeach the victim witnesses. In the Fifth Circuit, the showing of materiality for records restricted to impeachment is even higher than the general standard in *Agurs*. *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976), *rehearing denied*, 544 F.2d 518, holds in this case the movants must demonstrate that the new evidence probably would have resulted in an acquittal.

The likelihood of an acquittal based upon the records' availability during the government's case fails the stringent test. Obviously, if any prior witnesses' credibility was subject to impeachment beyond what had been accomplished, they were available for recall. It serves no purpose for the defense to claim now that they were precluded from that alternative because of time pressures. What was involved was a legal analysis of the impeachment value of the documents and a tactical decision as to how benefit could best be derived. As in the earlier sections of this brief, the trial strategy deliberately adopted by counsel is binding on an accused.

[1363] GRANTING A NEW TRIAL TO MOVANTS IS NOT IN THE INTERESTS OF JUSTICE.

Rule 33 authorizes a new trial in the interests of justice, and that basic standard is not met on this record. The court in reviewing a trial must balance evidence that the verdict produced a miscarriage of justice against the interest in finality and adherence to procedural requirements, recognizing that the public interest as well as the movants' must be considered. *U.S. v. Smith*, 179 F. Supp. 864 (D. C.D.C. 1959), *aff'd*, 283 F.2d 607, *cert. denied*, 364 U.S. 938. Justice Cardozo addressed this point in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934):

> Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Again, Justice Clark warned against the narrow view of fairness on reviewing allegations of trial errors:

> In the review of a criminal conviction after a long and bitterly fought trial, there is considerable incentive for reviewing judges to order reversal. It is comparatively easy to single out particular instances, which, apart from their settings in the total trial, may afford a dramatic basis for appeal to the American spirit of fair play and cherished love of personal liberty. Such an opinion writes itself, chances of reversal and reinstatement of the verdict are remote, and academic acclaim is assured. But there is a demand for what Wigmore (Evidence, 3d Ed. 1940,

§21) calls 'the solid claims of law and order'; * * * Of course we must be acutely sensitive to errors affecting human rights and freedom; but there is an equal demand that the law should have its way when a long and fair trial has proceeded to its natural conclusion. *U.S. v. Antonelli Fireworks Co.*, 155 F.2d 631, 641-642, (2nd Cir. 1946), *cert. den.*, 329 U.S. 742.

[1364] Granting movants a new trial denies that legitimate demand if such trivialities as argued here - dismissing a twelfth juror at the urging of movant's own counsel; a tactical judgment deliberately made in the interests of the defendants, not by a corrupt or incompetent novice, but by one of the leading criminal defense lawyers in the South; an unfortunate seven-word clause in a carefully prepared charge covering approximately sixty pages in the transcript of which, in context, explained unmistakeably to the jury that the burden of proof is always on the government and never shifts to the accused; a "withheld" box of movants own business records that, at most, was in the possession of the government for a one month period etc. – overturn all the patient efforts of this court over ten weeks to preserve the essential attributes of a fair trial.

The movants have contended that they will assert the claim of double jeopardy to prevent a retrial, or to void a second conviction. Such a claim ought not to be successful as movants have sought a new trial; and where an accused successfully seeks a review of a conviction, there is no double jeopardy on a new trial. *Bryan v. U.S.*, 338 U.S. 552 (1950).

An inconsistency exists in the reasoning which would allow movants to claim error in the discharge of the twelfth juror, a mere procedural right, even though their counsel acted deliberately; and, yet, conclude that counsel was empowered to waive their double jeopardy protection, a constitutional right,

by asking for a new trial without movant's knowledge and express authority. At this time movants contend that they never authorized the waiver of their double jeopardy rights, and will request that the court find that they are not bound by the decision of their attorneys to seek a rule 33 new trial on the errors committed during trial, rather than a rule 29(c) acquittal. [1365] Without a request under rule 33, it is clear that the trial court unlike an appellate court may not, *sua sponte*, order a new trial.

A further attack on the grounds of double jeopardy may arise out of *U.S. v. Jorn*, 400 U.S. 470, 485 (1970) where it was held that an accused has a valued right to take his case to the original jury, and unless a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the trial, the prosecution is barred from a retrial, even after the defense commits an imprioriety at the initial trial. If the *Jorn* "valued-right to a particular jury" principal is applied and movants are found to have a valued right to maintain their particular jury of 12, a possible jeopardy problem is presented where without the movants' consent, one of the twelve jurors was discharged. The courts failure to scrupulously exercise its judicial discretion and carefully consider the defendants' right to have their trial completed with a jury of twelve, may be sufficient to bar retrial. See *Arizona v. Washington*, 546 F.2d 829, 832 (9th Cir. 1977), *cert. granted* (45 U.S.L.W. 3690, 4/18/77).

The government will oppose any asserted claim of double jeopardy on behalf of the movants. The position is not tenable in the law since the movants are bound by the deliberate litigation strategy of their counsel who filed motions expressly seeking a new trial on their behalf, thus waiving the double jeopardy claim. This waiver is binding on movants even without prior consultation and express authorization, absent exceptional circumstances which do not exist here. In short, the jeopardy

problem is resolved by precisely the same legal principals that preclude movants from asserting their rule 23(b) claim. By failing to apply the proper waiver principals to the rule 23(b) procedural right to twelve jurors, its application to the constitutional protection of double jeopardy is made questionable. [1366] This inconsistency may invite a reversal in an appellate court at great waste of judicial resources. Already the trial of this case has consumed ten weeks. Even a slender possibility of an appellate double jeopardy ruling following retrial is intolerable when the issues are, in the this court's apparent view "razor-thin" at best. The jeopardy problem, if any, is completely eliminated if a new trial is ordered by the Fifth Circuit rather than the district court. In view of the costs and time already expended and which shall be required in the event of a retrial it is surely in the interest of sound judicial administration to deny the post-verdict motions and allow the appellate courts to resolve the question of law.

A further reason to deny the post verdict motions is that the government's right of appeal is narrow. To decide this case on the issue of rule 23(b) or on the Mann charge is to decide purely legal questions to which less than ten pages of a ten thousand page transcript applies. The Fifth Circuit could easily focus on the compact legal issues and ought to be allowed to resolve them. Where the trial court views the legal question as "razor-thin", the government in fairness ought to be able to argue its contentions in the appellate courts, especially where the alternative is a retrial in a case of this length and importance. The Court of Appeals and, if necessary, the Supreme Court have the function of refining the law in actual cases or controversies coming before them. The issue involving rule 23(b) ought to be addressed by these courts.

The Supreme Court has held that the government cannot take an appeal without express statutory authority. *U.S. v. Sanges*, 144 U.S. 310 (1892). At present, the Criminal Appeals

Act, 18 U.S.C. §3731 does not authorize an appeal from the grant of a new trial. It appears that this is an interlocutory order and non-appeable in a criminal case. There further does not appear to be any procedure for the district court to certify a controlling [1367] legal question for review as is commonly done in civil cases pursuant to 28 U.S.C. §1291.

The government's alternative to a direct appeal is to peition for a writ of mandamus pursuant to 28 U.S.C. §1651. However, mandamus is traditionally only available to compel an inferior court to exercise its authority when it is its duty to do so. *Roche v. Evaporated Milk Association*, 319 U.S. 21 (19430. Mandamus is not to be used a substitute for an interlocutory appeal. *Will v. United States*, 389 U.S. 90 (1967).

It is appropriate for this court to take note of the ease with which the movants could seek review of their legal claims. By contract, the government's opportunity is greatly limited, and, perhaps, totally foreclosed. When the ramifications of a retrial involve so many people beyond the parties and the court, and the issue is so close on purely a legal question, in weighing the public's interest, the Order Granting New Trial surely is not in the interests of justice. It burdens this court, the government, and all other litigants, civil and criminal, whose day in court must be further delayed during a lengthy retrial which the Fifth Circuit would well determine to be unnecessary.

It is further appropriate to consider the costs already borne by the public: ten weeks of trial, a postal investigation covering 18 months; a ten-thousand page trial transcript; and several hundred pages of legal briefs on post-verdict issues and the attorney hours required to produce them. A jury served for 10 weeks at a great personal and economic sacrifice. They deliberated carefully for two days and unanimously concluded that the movants were guilty. Witnesses including victims of this crime, were brought to Atlanta to testify at great disruption

to their personal lives both emotionally and monetarily. Considering the interests of jusicte, Judge Gesell [1368] recently observed:

> Retrials are almost always unsatisfactory. Counsel tend to try them more perfunctorily, testimony lacks freshness, subtle differences in recollections are blown up to challenge credibility and a certain atmosphere of staleness is created. All this impedes the search for truth. We also tend to forget the earnest members of the public who as innocent bystanders have their lives repeatedly disrupted because they were at or near the scene of the offense. Grand jury appearances, line-up appearances, witness interviews by police and prosecutors, suppression motions, trial appearances, all are present here. When does a citizen's obligation cease? The lead Government witness in this case had to make considerable sacrifices to appear at the last trial.

U.S. v. Ingram, 412 F. Supp. 384, 386 (D.C.D.C. 1976). To these observations it could be added that where the crime was committed nearly seven years ago and the initial trial took place three years ago, difficulties are present in locating witnesses who, if found, may be incapable of giving further testimony. Certainly the difficulty for a second jury to find the truth would be significantly increased.

A new trial does not serve the interest of justice. At a time when all Americans are asked to practice conservation of our resources, it is appropriate to note the crushing drain now exerted on this country's judicial system. To order a new trial even at great cost is certainly mandated where error, clearly shown, affects the substantial rights of a defendant. The government strongly urges that nothing of that nature exists in this record, and that to grant a new trial not only wastes, at immense

cost, all the prior proceedings, but it further commits Your Honor and the entire district to an unnecessary, costly, and perhaps, a null and void retrial. Such an act, where the government is precluded from corrective appeal is not in the interests of justice. If this court must relive the case of *U.S. v. Stanley Speigel, et al*, due to trial error, it ought to be clearly mandated. Justice to the [1369] accuser, and vindication of the public's interest in the efficient and sound functioning of the administration of public justice heavily weigh against granting a new trial. If, in the court's judgment, the issue is razor-thin, considerations of judicial economy and the preclusion of a government appeal, weigh the balance clearly on the side denying the motions.

Justice Frankfurter concurring in *Johnson v. U.S.*, 318 U.S. 189, 202 (1943), offered an admonition that applied well to this matter:

> In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.

Reliving the whole trial, it is apparent that the movants were skillfully represented by aggressive, competent counsel, and their trial was fairly conducted by the court. That the 11 juror issue was not raised by counsel is further evidence of the truth in this matter – that the episode did not affect the movants substantial rights. Counsel knew that the waiver of a jury of twelve occurred on June 10 and that the discharge of the juror was deliberately sought on August 12 to secure an advantage for the defendants. Thus, counsel having aggressively protected the rights of their clients throughout the proceedings, ignored

the rule 23(b) issue. Unlike counsel, movant Speigel, untrained in the whole-cloth fabric of the law and its philosophy and reasonableness, but nevertheless possessing an undeniably facile mind, months after his conviction engaged, purely and simply, in a "quest for error". Pouring methodically through the annotations to the procedural rules looking for errors, movant Spiegel violated the basic tenets of criminal trial review. As a layman, albeit, a most intelligent layman, and as a convicted defendant, movant Speigel's efforts are understandable. This court's [1370] function, however, is "to keep the balance true" and not to become a party to a narrow quest for error.

The government emphasizes that convictions in this case have been obtained. Upon review of alleged trial errors in a close matter, the presumption of innocence is not to be applied. Unlike during the trial, the focus here is on the fairness of the proceedings, and whether any error affected the substantial rights of the movants. Undeniably this court suffers a disadvantage in passing on these motions nearly three years after the trial. As the Supreme Court stated in regard to allowing defendants additional time to file Rule 33 motions:

> . . . extension of that time indefinitely is no insurance of justice. On the contrary as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past.' *U.S. v. Smith*, 331 U.S. 469, 476 (1947).

Uncertainty, if any, now in the court's mind, considering the rights asserted, the facts, the law, and the consequences of this

ruling, ought to be exercised in the favor of preserving the verdict.

CONCLUSION

The errors asserted have not prejudicially affected the movants' substantial rights. A valid stipulation waiving the rule 23(b) right to twelve jurors was filed on June 10 in open court. Movants are precluded from asserting that right by a deliberate waiver on their behalf by competent counsel as a part of trial strategy on August 12. Notwithstanding the prior waivers, any error committed on August 12 was invited by counsel and may not be asserted after conviction. Should the court find that error was committed and that the movants are entitled to assert it, the deliberate choice by counsel to seek the [1371] juror's discharge and not to object precludes a finding of plain error.

Movants direct misrepresentations made in person and by telephone to witnesses called by the government were in issue in this case. Since movants' objective conduct as well as their subjective intent was in issue, and because approved curative instructions were given by the court, the reading of a Mann charge does not require a reversal.

The business records in box number 3 did not contain exculpatory information. They were available to movants prior to trial and during the defense case, and do not, therefore, constitute withheld evidence. With the exercise of due diligence and a specific request prior to July 30, these records would have been earlier located and made available in room 532. Thus, no Brady-type violation occurred; and, the government's inadvertent failure to comply with the trial court's directive regarding the housing of corporate records did not affect the movants substantial rights.

The interests of justice heavily favor preserving the verdicts in this ten-week trial.

Accordingly, the government urges that the court reconsider its decision and deny the motions.

Respectfully submitted,

JOHN W. STOKES, JR.
United States Attorney

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the party (parties) in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery.

This 26th day of May 1977
/s/ William P. Gaffney
Assistant United States Attorney
Attorney for U.S.

APPENDIX G

[1372] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	CRIMINAL INDICTMENT
v.	:	
	:	NO. 27,972
STANLEY SPIEGEL, et al.	:	

FILED: June 3, 1977

GOVERNMENT'S RESPONSE OPPOSING DEFENDANT SPIEGEL'S MOTION TO DISMISS THE MOTION FOR RECONSIDERATION

The United States of America by its undersigned attorneys, John W. Stokes, Jr. United States Attorney, Northern District of Georgia, and William P. Gaffney, Assistant United States Attorney, files this response opposing defendant Spiegel's motion to dismiss the government's motion for reconsideration, and in support of its position shows the following:

1.

Defendants Stanley Spiegel, Allan M. Holloway, and Allen E. Perkins were convicted on August 17, 1974, on federal mail fraud charges for using the United States mails in furtherence of a scheme to defraud and to obtain money, in violation of 18 U.S.C. §1341.

2.

Defendants Spiegel, Holloway, and Perkins filed motions for new trial on August 23, 1974, alleging that the verdict was contrary to the evidence and without evidence to support it; that the verdict was against the weight of the evidence; and that the verdict was contrary to law and principles of justice and equity.

[1373] 3.

Movants Holloway and Perkins also sought on August 23 an extension of time for a period of 30 days following either completion of the trial transcript, or the conclusion of any evidentiary hearings conducted on defendant Spiegel's motions to dismiss, in which to file an amended motion for new trial.

4.

Movant Spiegel filed a motion on August 23 to enlarge the time for filing an amended motion for a new trial and a motion for judgment of acquittal, until 60 days after the completion of the trial transcript.

5.

The court on August 26 granted movant Spiegel until December 15, 1974, in which to file an amended motion for new trial and a motion for judgment of acquittal.

6.

The court granted movants Holloway and Perkins motion for an extension of time in which to file an amended motion for a new trial on September 24, 1974.

7.

On March 24, 1976, the court ordered that movant Spiegel's motion for new trial and memorandum in support thereof was to be filed within 45 days, that is by May 8, 1976.

8.

On May 11, 1976, counsel for Holloway and Perkins met with Judge Moye in chambers and obtained a thirty day extension from that date within which all defendants' amended motions for new trial were to be filed.

[1374] 9.

On May 24, 1976, the court ordered that the movants' post-trial motions be filed no later than June 11, 1976.

10.

Movants Holloway and Perkins filed an amended motion for new trial on June 11; movant Spiegel filed a motion for judgment of acquittal pursuant to rule 29(c) and a rule 33 motion for new trial on June 11.

11.

The government's response to the post-trial motions, the consent of counsel having been obtained, was filed on September 7. The movants were ordered to reply, if desired, by September 21.

12.

By court order, movant Spiegel was allowed to file his reply on September 27.

13.

An evidentiary hearing was held from February 22 through 24, 1977, on issues raised in the post-trial motions.

14.

On April 14, 1977, an order granting a new trial was filed, the sole grounds for which was the verdict by eleven jurors.

15.

On April 15, Attorney Garland, while at a seminar held at the Hyatt Regency Hotel, Atlanta, Georgia, stated to government counsel that due to conflicting trial settings counsel for Spiegel would not insist on an immediate retrial. [1375] Reference was made to several long cases then pending before this court involving clients of Mr. Garland. Attached as Exhibit A is a copy of a letter dated March 24 to Judge Henderson from attorneys Garland and Kadish.

16.

On April 20, 1977, the government filed a motion for reconsideration asking the court to vacate the order granting new trial and schedule oral argument. The government was granted leave of court to file a brief in support of its motion.

17.

Subsequent to the filing of this motion, Attorney Kadish in a telephone conversation with government counsel stated that he did not wish to proceed with a retrial as early as May 24; further, Attorney Kadish stated that the government could have as much time as necessary in filing its brief in support of the motion for reconsideration.

18.

On April 26, 1977, government counsel conferred with Attorneys Garland and Kadish in the United States Courthouse, Room 318, and was informed that movant Spiegel would contend that a retrial is barred by the double jeopardy clause. Attorney Kadish expressed concern that the time for filing pre-trial motions ought to be tolled during the period in which reconsideration was pending: he again stated his desire that the retrial not commence on May 24. Attorney Kadish suggested that government counsel advise the court [1376] that counsel were in agreement regarding the tolling of his time for filing pre-trial motions and that an order removing the case from the calendar of May 24 would be necessary.

19.

Government counsel thereafter met with Judge Moye in chambers relaying Attorney Kadish's concerns. The jeopardy problem was brought to the court's attention as well as the procedural steps required in the event an appeal would be necessary. Judge Moye stated that if an appeal were pending that no retrial would be possible and that the procedural steps involved made it unlikely that a retrial could commence by May 24. The court stated it would consider a motion removing the case from the calendar.

20.

On or about May 5, Attorney Kadish telephoned government counsel indicating a significant change in his position after discussions with movant Spiegel. All prior statements of counsel notwithstanding, movant Spiegel's position was then stated to be that the 60 day period for retrial had to be computed from April 13, regardless of the pending reconsideration.

21.

On May 6, 1977, all counsel met with Judge Moye in chambers regarding the government's motion to continue trial from the May 24 calendar. At this meeting counsel for Spiegel outlined his position on the jeopardy issue. The court informed counsel that a full reconsideration of the order granting new trial would be forthcoming after the briefs were received. The court set May 10 for the government's brief, May 13 for the movants' briefs, and stated that the court's ruling would be made by May 18.

[1377] 22.

On the evening of May 6, government counsel was notified that Attorney Kadish had been hospitalized and had been placed under bed-rest for at least a one-week period.

23.

Counsel for movants Holloway and Perkins commenced a two week trial on May 9 in a criminal matter involving State Senator E. Culver Kidd.

24.

Government counsel was informed that Judge Moye was to be in Washington D.C. for the entire week commencing May 16.

25.

Government counsel is presently responsible for a criminal case involving fraud charges against attorney and former State Senator Maylon K. London, which is scheduled for trial in the Gainesville Division for the term commencing June 6. A related trial in 1975 lasted two weeks.

26.

In view of paragraphs 22 through 25, government counsel met in chambers with Judge Moye on or about May 9 and informed the court of the foregoing facts. The court expressed the view that a new briefing schedule would depend upon all counsels' availability. The government understood that it was not obligated to file its brief on May 10 in view of the changed circumstances affecting all counsel and the court.

27.

Attorney Garland was notified by telephone that the government would not be filing its brief on May 10, and he expressed no opposition at that time inasmuch as Attorney Kadish would be unavailable for the balance of that week.

[1378] 28.

On May 23, government counsel informed Judge Moye in chambers that a handwritten draft of the brief had been submitted for typing but due to other work in progress and the length of the draft, it could not be completed until later in the week. The court expressed no disapproval and stated that the movants would be given additional time in which to respond.

29.

The government filed its brief on May 26, 1977.

WHEREFORE, having fully responded, the government requests that the motion to dismiss be summarily denied.

Respectfully submitted,

JOHN W. STOKES, JR.
UNITED STATES ATTORNEY

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery.

This 3 day of June 1977

/s/ William P. Gaffney
Assistant United States Attorney
Attorney for United States

[1379] STATE OF GEORGIA)
COUNTY OF FULTON)

Before me, an officer duly authorized by law to administer oaths, personally appeared William P. Gaffney, who being first duly sworn, deposes and upon oath states that the facts set forth in the foregoing Response are true and correct to the best of his knowledge, information and belief.

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

Sworn to and Subscribed
Before me this Day of
3rd June 1977.

/s/ Barbara S. Fincher
NOTARY PUBLIC

EXHIBIT A

[1380]

LAW OFFICES
GARLAND, NUCKOLLS, KADISH, COOK
& WEISENSEE, P.C.
1012 CANDLER BUILDING
PEACHTREE STREET
ATLANTA, GEORGIA 30303
404/ 577-2225

March 24, 1977

Honorable Albert J. Henderson, Jr., Judge
United States District Court
Northern District of Georgia
Atlanta Division
United States Courthouse
Atlanta, Georgia

Dear Judge Henderson:

I am writing this letter to you as Chief Judge of this District Court on behalf of Ed Garland and myself. We hope to obtain the court's advice and consideration of calendar problems relating to the scheduling of trial dates by various Judges of this Honorable Court in certain "long cases" hereinafter enumerated. Although our law firm has endeavored to serve this Court in a diligent fashion and endeavored to only accept cases which we will be able to try without burdening the Court with requests for continuances, the individual calendar procedure now in effect has resulted in our inability to effectively discharge our responsibility to this Court and to our clients. Under the individual calendar system, it is not possible for us to ascertain, when we take representation of a particular case, when that case will be reported for trial by a particular Magistrate. It is even more difficult to predict when any one of the

Judges of this Court will issue an order setting the case down for his particular trial calendar.

I am sure that other members of the criminal defense bar have felt the trial pressures now confronting our law firm; however, it would appear that our firm has a greater involvement in the "long case" calendar of this Court and it is in this area that we believe that Your Honor should take some action to achieve a certain amount of judicial coordination and cooperation so that defense counsel involved in long cases can professionally serve this Court.

The situation confronting our law firm is as follows:

1. April 4, 1977 - *United States v. Paul Levine*, Cr. 76-184-A, scheduled for trial before Honorable Richard Freeman. This case is expected to last approximately two weeks. Counsel of record is Mark J. Kadish. This case was set for trial by Judge Freeman approximately three weeks ago. The Assistant United States Attorney is Glenna Stone. I was retained in this matter on June 15, 1976.

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2. April 18, 1977 - *United States v. Ernie Crothers, Horace Jones and Douglas Jones*, Cr. 76-380A and Cr. 76-381A. These cases are scheduled for trial before Honorable Newell Edenfield and are expected to take place seriatim and last approximately two weeks. Counsel of record are both Mark J. Kadish and Edward T. M. Garland, and Assistant United States Attorney Robert Boas. The cases were calendared by Judge Edenfield on March 18, 1977. We were retained in these cases in December, 1976.

3. April 20, 1977 - *United States v. Augustus Frank Adamson*, Cr. 77-63-A, scheduled for trial before Your Honor. This case is expected to last at least two weeks. Counsel of record will be Edward T. M. Garland, who was retained on March 14, 1977. This case was set by Your Honor on March 3, 1977. The Assistant United States Attorney in this matter is Gale McKenzie. It should be noted that the Adamson case was set down before Judge Edenfield set down the Ernie Crothers, Horace Jones, et al matter, and that we were retained prior to that date.

4. *United States v. Stanley Kreimer*, Cr. 76-26-A, before Honorable Charles A. Moye, Jr. Counsel of record is Edward T. M. Garland, and the Assistant United States Attorney is William Gaffney. The exact trial date of this case is not firm, but Judge Moye has indicated that it is likely it will be tried sometime between April 12, 1977 and May 30, 1977. Mr. Garland was retained in this case in January of 1976. The trial is expected to last from four to six weeks.

5. *United States v. Stanley Spiegel*, Cr. A-27972, A Motion for New Trial in this case is pending before Honorable Charles A. Moye, Jr., who has ordered counsel of record, Edward T. M. Garland and Mark J. Kadish, to be available for a trial on May 30, 1977. Expected length of this case is six to ten weeks. Mr. Garland was retained by Mr. Spiegel in January of 1973. Mr. William Gaffney is the Assistant United States Attorney in this case.

6. June 6, 1977 - *United States v. James Black, et al*, Cr. 76-409A. This case was set for trial by Your Honor on January 7, 1977. Edward T. M. Garland is counsel of record for Mr. Harold Chancey, and Mr. Jerry Froelich is the Assistant United States Attorney. Mr. Garland was retained by Mr. Chancey in January, 1977. This case is expected to last from four to six weeks.

It is obvious that the trial schedule, from the standpoint of our law firm, is onerous. We are in the process of using all of our professional resources to properly prepare each of these cases for trial. Of course, this law firm also has other commitments at other State and Federal Courts throughout

[1382] Honorable Albert J. Henderson, Jr., Judge

March 24, 1977
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Georgia and in some of our sister states. It would appear from the cases enumerated above that either Mr. Garland or I, particularly Mr. Garland, will be on trial in this Court from early April, 1977 through July, 1977, without any hiatus.

We would most respectfully ask Your Honor to arrange a meeting between Mr. Garland, Mr. Kadish and the various United States Attorneys to review the "long case" calendars with a view to adjusting the "long case" calendar to the extent that counsel for both sides will have some reasonable period of time between cases so that we can better serve this Court.

As I write this letter Mr. Garland is currently on trial in the matter of *State of Georgia v. Robert Llewelyn*, Indictment Numbers A-34160-1-2, before the Honorable Charles A. Weltner. This trial commenced on Tuesday, March 22, 1977, and is expected to last into next week. Thereafter, Mr. Garland is scheduled to try the murder case of *State of Georgia v. William Edward Alley*, pending in the Superior Court of Catoosa County, and this trial is expected to last approximately one week. Mr. Garland was retained in the Llewelyn case in February, 1977, and has been representing Mr. Alley since October, 1976. He recently completed the trial of *United States v. William Edward Alley* before the Honorable Richard Freeman in Rome, Georgia. Prior to that, Mr. Garland tried the case of *United*

States v. Donald James, et al, before the Honorable Charles A. Moye, Jr., which case last approximately two weeks. Mr. Kadish has tried the case of *United States v. John William Gibbs* before the Honorable Wilbur Owens in Macon, Georgia, which mistrial and retrial consumed approximately two weeks, concluding on January 20, 1977. Thereafter Mr. Kadish tried the case of *United States v. Capt. Ronald Smith* before the Honorable Kirby Smith at Keesler Air Force Base, Biloxi, Mississippi, which trial consumed approximately one week. Mr. Kadish has most recently appeared before Honorable Charles A. Moye, Jr. in an evidentiary hearing relating to a Motion for New Trial in the matter of *United States v. Stanley Spiegel, supra*, the hearings, preparation therefor and submissions of briefs consuming at least six working days. Most recently Mr. Kadish has been working on an appeal of a civil matter from this Court, styled *Dr. Joseph Gilbert v. Donald Johnson, et al*, Case No. 16424, which case involved a most complex record in excess of 5,000 pages, and has an appellant's brief deadline of April 11, 1977.

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This letter is written reluctantly as we do not wish to burden Your Honor with additional administrative problems; however, we see no alternative but to seek the Chief Judge's counsel and advice on the matters herein set forth.

Very truly yours,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND

/s/ Mark J. Kadish
MARK J. KADISH

MJK:sb

cc: Honorable Charles A. Moye, Jr., Judge
Honorable Newell Edenfield, Judge
Honorable Richard C. Freeman, Judge
Honorable John Stokes, U.S. Attorney
Mr. Bruce Kirwan, Federal Defender Program
Honorable Allen L. Chancey, Magistrate
Honorable Joel Feldman, Magistrate
Honorable Owen Forrester, Magistrate
Ms. Glenna Stone, Assistant U.S. Attorney
Mr. Robert Boas, Assistant U.S. Attorney
Ms. Gale McKenzie, Assistant U.S. Attorney
Mr. William Gaffney, Assistant U.S. Attorney
Mr. Jerry Froelich, Assistant U.S. Attorney

[1384] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
: CRIMINAL INDICTMENT
v. :
: NO. 27,972
STANLEY SPIEGEL, et al. :

Argument and Authority

Defendant Spiegel seeks a dismissal to prevent a decision on the merits of the government's motion for reconsideration. The facts, however, show that a timely motion for reconsideration has been filed suspending the finality of the Order Granting New Trial. The illness of Attorney Kadish, as well as the commitments of the remaining counsel and the court, prompted the revision of the briefing schedule fixed on May 6. The court retains discretion to modify an informal briefing schedule as circumstances dictate. No abuse of that discretion occurred in this instance. If the defense is placed at a disadvantage by the length of the government's brief, the remedy is to ask for a sufficient amount of time in which to fully respond.

In the event rigid time bars are to be applied, none of movants' post-trial motions filed June 11, 1976 were timely. Rules 29(c) and 33 require that the motions must be filed within 7 days of the verdict or within such further time as the court may fix *within the 7-day period.* Neither of the orders extending time were set within that period. The record shows that movant Spiegel's extension of time was [1385] granted nine days after verdict, effective through December 15, 1974. No order further extending the time beyond December 15, 1974, was filed, nor was such a motion on behalf of defendant Spiegel presented to the court prior to expiration of the

additional time granted. It is not clear that the court even possesses the power to further extend the time outside the original 7-day period under rules 29(c) and 33. Movants Holloway and Perkins initial motion for an extension was not granted until forty days after verdict, long after the court's power to extend time had lapsed.

The effect of this jurisdictional failure removes from the district court's consideration all grounds asserted for post-trial relief except those dealing with the sufficiency of the evidence filed on August 23, 1974 (see paragraph 2, Government's Response). Movant Spiegel's extension, if properly granted, expired on December 15, 1974; while movants Holloway and Perkins never received a lawful extension within the 7-day period after verdict. Thus, the sole grounds properly raised before this court are without merit. The remaining grounds asserted on June 11, 1976, must be addressed to the Fifth Circuit, as this court is without jurisdiction to entertain them. Rules 29(c) and 33, F.R.Crim.P.

Beyond the jurisdictional failure cited, the movants are not prejudiced by the additional time allowed the government in filing its brief in support of reconsideration. This is a matter clearly within the court's discretion, unlike the jurisdictional time requirements set forth in rules 29(c) and 33. No evidentiary hearing is necessary to dispose of this contention. It appears that movant Spiegel seeks to [1386] divert attention from the merits of the reconsideration issue and create a false issue regarding the prosecution's conduct and motives. Such an effort does not deserve to be dignified by a hearing.

A reading of the Brief in Support of the Motion for Reconsideration amply demonstrates that it is not a pleading filed in bad faith as a delaying tactic. The issues researched and briefed reach the heart of this case and the legal principles outlined compel a reversal of the pending order for new trial.

The record does not need to be further burdened by a hearing collateral to the merits of the dispute.

A timely petition for reconsideration suspends the finality of an earlier order, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. *Department of Banking v. Pink*, 317 U.S. 264 (1942). In *United States v. Healy*, 376 U.S. 75 (1964) it was held that the government's 30-day period for filing notice of appeal runs from the denial of a timely filed petition for reconsideration rather than the date of the original judgment. Most recently in *United States v. Dieter*, ____ U.S. ____, 45 U.S.L.W. 3277 (Decided Oct. 12, 1976), the Supreme Court reaffirmed the principal that a timely petition for reconsideration renders the original judgment non-final for purposes of appeal for as long as the petition is pending.

These cases control here and the finality of the April 13 Order Granting New Trial has been suspended since April 20. While no decisions have passes specifically on the [1387] issue of finality with respect to the Speedy Trial Act, 18 U.S.C. §3161(e), it would be unthinkable to hold otherwise, unless the motion for reconsideration were filed in bad faith. The policy of allowing district courts the opportunity to promptly correct their own alleged errors would be defeated if the government could not petition for reconsideration, absent bad faith, without jeopardy of violating the Speedy Trial Act.

Movant Spiegel contends that if the court does not try him by June 12, that 18 U.S.C. §1361(e) compels that the indictment be dismissed. [1] The sixty-day period for retrial, however,

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1 Beyond this speedy trial claim, movant Spiegel through counsel has asserted that all retrial is barred on jeopardy grounds.

is now suspended as the motion for reconsideration is still pending. The action occasioning the retrial is not final unless and until the court denies reconsideration. By a separate pleading, the government has requested a hearing on its motion for reconsideration. No need exists to take up further questions regarding the timeliness of the government's brief: it presents a substantial legal attack on the propriety of the grant of a new trial. The government did receive an informal extension to file its brief, just as the defendants have received on several occasions set out in the Government's Response. If defendants have a legal rejoinder on the merits, it should be filed prior to the hearing requested by the government. No purpose can be served by procedural wrangling other than obfuscating the legal issues now focused for the court.

[1388] In conclusion, the government urges that the motion to dismiss the motion for reconsideration be denied without a hearing. In the alternative the government asks the court to deny the post-trial motions filed on June 11, 1976, as untimely, and overrule the motions for new trial filed on August 23, 1974.

Respectfully submitted,

JOHN W. STOKES, JR.
UNITED STATES ATTORNEY

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery.

This 3 day of June 1977

/s/ William P. Gaffney

Assistant United States Attorney
Attorney for United States

APPENDIX H

[1396] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL INDICTMENT**
V.	:	
	:	**NO. 27,972**
STANLEY SPIEGEL, Et al	:	

FILED: June 7, 1977

RESPONSE TO GOVERNMENT BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND SUPPLEMENTAL RESPONSE TO GOVERNMENT MOTION FOR RECONSIDERATION

1.

THE GOVERNMENT'S MOTION FOR RECONSIDERATION IS NOT PROPERLY BEFORE THIS COURT AND SHOULD BE DISMISSED

Rule 91.1 of The Local Rules for Northern District of Georgia states:

> **"Every motion, in both civil cases and criminal proceedings, when filed, shall be accompanied by a memorandum of law citing supporting authorities and where allegations of fact are relied upon, affidavits in support thereof. *The clerk shall not accept for filing any motion which is not in conformance with this rule.* (Emphasis added).**

The *mandatory requirement* that a memorandum of law accompany the motion was not fulfilled. The motion was not, therefore, in the proper form at the time of its filing and must be denied. See *United States v. Reyes*, 280 F.Supp. 267 (D.C. N.Y. 1968).

Alternatively, assuming that the brief filed May 26, 1977, could subsequently attach to the unsupported motion of April 20, 1977, the formal mandatory requirements of Rule 91.1 would have been satisfied only after a lapse of *36* days. Such delay is inexcusable, unreasonable and in total disregard of [1397] Your Honor's order. No extension of time was granted by the Court nor was there any formal or informal agreement entered by defense counsel. (See accompanying affidavits of Mark Kadish and Edward Garland) Exhibit A. For failure to file the required memorandum, the Motion for Reconsideration must be denied.

2.

BRIEF FILED MAY 26, 1977, WAS UNTIMELY AND VIOLATED RULE 45(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

By order of this Court, the Government's brief was due on May 9th. It was not filed until May 26, 1977. No enlargement of time was granted by the Court. The brief of the Government is untimely and should not be considered as support for the Motion for Reconsideration. (See Rule 45(b) F.R.C.P.). The Court cannot countenance and be a party to the flaunting of the Federal Rules of Criminal Procedure.

3.

THE UNCONDITIONAL ORDER GRANTING NEW TRIAL CANNOT BE VACATED

The Fifth Circuit in *United States v. Spinella*, 506 F.2d 426 (1975) stated that:

> The order granting the new trial necessarily has the effect of vacating the judgment of conviction rendered in the earlier trial.
>
> * * *
>
> The only question that remains, once we have determined that the judgment of conviction obtained at the first trial could not be 'reinstated', is whether Spinella may be tried again for the offenses charged in the first two trials. At 430.

As in *Spinella*, the jury verdict in this case cannot be reinstated once expunged by the order granting a new trial. An order vacating the new trial order and attempting to reinstate the verdict of the jury would raise serious questions involving double jeopardy and jurisdiction. The Government's prayer for vacation of the order of April 13th should be denied.

4.

THE IDENTIFICATION OF "IN TANDEM" SUBSTANTIAL ISSUES, LEGAL CONCLUSIONS, AND/OR FACTUAL FINDINGS ARE NOT REQUIRED

Counsel for the Government has conceded that the Government never had the right to appeal Your Honor's order granting a new trial. (See paragraph 3 of Motion for Hearing, attached as

Exhibit "B"). The order of April 13th (certified into the Clerk's records on April 14, 1977) states that the new trial was to be granted only on the ground of the eleven juror issue. Elaboration of additional "substantial issues" that would have tandem or enhancing effort in a non-appeal setting is wasteful of the time and resources of the Court and is not required or a prerequisite to the granting of a motion for new trial.

5.

THE ISSUANCE OF A WRITTEN OPINION FULLY SETTING FORTH COURT'S LEGAL CONCLUSIONS AND FACTUAL FINDINGS IS NOT REQUIRED

Counsel for the Government has conceded they were in error and never had the right to seek appropriate appellate remedy to reverse this Court's new trial order of April 13, 1977. (See paragraph 3 of Government's Motion to Continue Trial May 6, 1977 and page 38 of Government's Brief in Support of Motion for Reconsideration May 26, 1977). Therefore, elaboration of additional "substantial issues" in a non-appeal setting is wasteful of the time and resources of all parties and is not a requirement or prerequisite to the granting of a motion for new trial.

6.

ORAL ARGUMENT ON THE ELEVEN JUROR ISSUE AND OTHER IDENTIFIED ISSUES IS NOT REQUIRED

Numerous Chamber conferences, plus two evidentiary hearings, have already been presented to this Court on this matter. Numerous briefs have been filed. Further argument is not necessary.

[1399] 7.

THE GOVERNMENT'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION IS REPLETE WITH ERRORS, CONJECTURE AND MISSTATEMENT OF FACTS

Defendant does not intend to burden the Court with a line-by-line analysis of the poetic license and wishful thinking contained in the Government's brief. However, we would be derelict to not draw the Court's attention to the following examples:

GOVERNMENT ALLEGATIONS	FACT
1. "Here the Movants, through competent and skilled counsel sought the discharge of a juror for tactical reasons . . ." (p. 1)	The juror was pregnant and became ill. Your Honor sought counsel's advice on a course of action. Lack of knowledge on the part of all counsel and the Court caused the situation to develop.
2. ". . . waited for verdict and upon conviction alleged reversible error" (Bottom p. 1)	Evidentiary hearings February 22 - 24, 1977, proved the 23(b) issue was not known to counsel until May, 1975. How can it be invited error or trial strategy if no one knew about the error until a year later.

GOVERNMENT ALLEGATIONS	FACT
3. "The ensuing colloquy (Tr. 120-127) reveals that defense counsel waived a 12 person jury in order to obtain additional peremptory challenges . . ." (p. 3)	Counsel Garland asked permission to approach bench to discuss the number of defense challenges. The Court interrupted Mr. Garland in the middle of his request (Tr. 120, line 6) to pursue the alternate juror question. The challenges granted had nothing to do with the waiver question other than being discussed at the same sidebar conference.
[1400] 4. "The net result of the bench conference was that the defendants gained 5 additional peremptory challenges in exchange for their waiver." (p. 4)	The Government received 4 additional challenges in exchange for the defendants' extra 5 challenges.

The above four examples should demonstrate to the Court that the Government's brief is grasping at straws, all of which were resolved, and rightfully so, by Your Honor's grant of a new trial on April 14, 1977.

8.

RULE 23(b) DOES NOT PERMIT A STIPULATION TO BE EXECUTED BY COUNSEL IN THE INSTANT CASE

Defendant Spiegel concurs with the Government's proposition that where an inherent personal right of fundamental importance is involved, a criminal defendant's personal waiver is required. See *Winters v. Cook*, 489 F.2d 174, 186 (5th Cir. 1973). Such rights include the waiver of the twelfth juror prior to verdict. *Patton, supra; United States v. Guerro-Peralta*, 446 F.2d 876 (9th Cir. 1971); *United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974). The Fifth Circuit has also clearly recognized the importance of *personal* assent of the defendant. *United States v. Smith*, 523 F.2d 788 (5th Cir. 1975).

United States v. Pacente, 503 F.2d 543 (7th Cir. 1974), cited at page 12 of the Government's brief, does not lend argument to the arguments of Government counsel. Contrary to the contention of the Government in *Pacente* that "nothing in the record otherwise indicated [that the defendant] agreed to [the Stipulation signed by counsel], (p. 12, 13 of Government's Brief), the factual context of *Pacente* pointedly illustrates that a colloquy ensued *in open court* following the excusal of the juror, and that the trial judge announced the facts concerning the excused juror. Even though it is easily distinguishable on its facts, *Pacente* [1401] should not be viewed as the proper solution to Rule 23(b) issues. Clearly, the more recent and better reasoned decisions require that personal assent be the proper standard. *Smith, supra; Guerror-Peralto, supra; Taylor, supra.* Defendant notes that *United States v. Stolarz*, 550 F.2d 488, 493 (9th Cir. 1977) cited at page 12 of the Government's brief did uphold an 11 juror conviction. *Stolarz* involved a written stipulation entered into personally by the defendant.

9.

RIGHT TO A JURY TRIAL IS A CONSTITUTIONALLY GUARANTEED RIGHT

The requirement of twelve jurors in federal criminal trials is a constitutionally and statutorily protected right. Although the Supreme Court has ruled that juries of six are constitutional [Williams v. Florida, 399 U.S. 78 (1970), at no time has that court held that a verdict may validly be reached if the number of jurors returning the verdict is less than the number designated by law to sit as the trier of fact.

As the Government correctly noted in its Brief in Support of Motion for Reconsideration, the Supreme Court in 1930 stated:

> [W]e must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing. *Patton v. United States*, 281 U.S. 276, 290 (1930).

The Government's reliance upon *Williams* in the case *sub judice* is misplaced. *Patton* sets the standard for waiver of the twelfth juror, as the Fifth, Ninth and other Circuit have recognized.

10.

ARGUMENTS BASED ON ALLEGATIONS OF "DELIBERATE WAIVER", "INVITED ERROR" AND DELIBERATE TRIAL STRAGEGY" ARE UNSUPPORTED BY THE RECORD

Following voluminous briefings, re-briefings, and a two-day evidentiary hearing, Defendant Spiegel would simply state the

[1402] allegations of "deliberate waiver", "invited error", and "trial strategy" are unsupported by the record and should not be given consideration. The Government arguments of "deliberate waiver", "invited error" and "deliberate trial strategy" were put to rest at the evidentiary hearing (February 22-24. 1977) when irrefutable proof was placed in the record showing that the 11 man juror issue was first discovered and researched in May, 1975, ten months after the dismissal of the twelfth juror, Mrs. Silver.

11.

UNITED STATES V. SMITH REQUIRES A NEW TRIAL UNDER THESE CIRCUMSTANCES

Counsel for defendant assert that this matter has been viewed and reviewed by this Court and does not require further consideration.

12.

THE "MANN INSTRUCTION" BY ITSELF MANDATES A REVERSAL

In the case of *United States v. Chiantese*, 456 F.2d 135 (5th Cir. 1977) where the "Mann instruction" was given, Chief Judge Brown and Circuit Judges Tuttle and Tjoflat stated that the giving of the "Mann instruction" constitutes reversible error regardless of any supposed curative charge.

> It is not – the word is not – to be used, and no one, prosecutor or judge can hope to be resuscitated. At page 137.

An en banc hearing is being held this very daty (June 7, 1977) to rehear on briefs without oral argument in this case.

Obviously, the en banc decision will apply *retroactively* to all pending cases that have asserted the issue and are still within the judicial processes of the Fifth Circuit.

13.

THE WITHHOLDING OF EVIDENCE ON MULTIPLE OCCASIONS INCLUDING POST-TRIAL WAS PROSECUTORIAL MISCONDUCT AND AFFECTED THE DEFENDANT'S SUBSTANTIAL RIGHTS

This issue has been briefed numerous times and has been the subject of two evidentiary hearings.

[1403] This Court's decision to grant a new trial was predicated upon the eleven juror question with an acknowledgement, in the new trial order, of the substantial other issues involved. Defendant Spiegel contends that this issue – standing by itself – is sufficient reason for a new trial and/or a judgment of acquittal.

United States v. Washington, 550 F.2d 320 (5th Cir. 1977) cited by the Government, cannot even be remotely connected with the case as it involved a widely published private reward offer ostensibly known about by all parties. No materiality was involved as in the instant case.

United States v. Prior, 546 F.2d 1254 (5th Cir. 1977), cited by the Government, involved withheld information already in possession of defendant. The bone of contention is a letter, copy of which went to the defendant. This case is inapposite. Here a single letter *with copy to defendant* is involved, whereas in the instant case we are speaking of hundreds of vital documents constantly requested and still admittedly withheld by the Government.

The other Government citation, *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976) is even more inappropriate as it involves prosecution failure to voluntarily disclose what had been labeled non-exculpatory material. Here, Defendant Spiegel requested time and again the withheld materials, most of which were exculpatory, useful for impeachment purposes as well as to prove defense contentions. Defendant Spiegel repeats his allegations that his constitutional rights have been violated and a judgment of acquittal or at the least a new trial was in order.

14.

THE ISSUE OF DOUBLE JEOPARDY IS NOT BEFORE THE COURT FOR DETERMINATION

This firm has done no specific research as to whether or not Defendant Spiegel can plead the issue. Counsel Kadish, when asked a direct question on the matter by Your Honor at the [1404] May 6 conference, indicated it would, of course, be considered. The legal issue of double jeopardy, however, has no bearing whatsoever on the Reconsideration Motion invalidly before Your Honor.

It is prosecutorial overreaching to use the possible claim of double jeopardy as a scare tactic in seeking vocation of a new trial order. It would likewise be inappropriate for Your Honor to allow this extraneous, non-related issue to trigger a vacation of the new trial order. Even-handed justice requires dismissal of the Government's Motion as invalid and of no legal consequence.

The truth of the matter is that the Government erred in thinking that Your Honor's Order of April 13 was appealable (see paragraph 3 of Government's Motion to Continue trial May 6, 1977), and when they finally realized that it was not appealable, commenced "waving the double jeopardy flag" in

order to try to influence this Court.

The granting of a new trial was in conformity with the law, and the Government's motions should be denied.

15.

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND/OR ARREST OF JUDGMENT DATED JUNE 11, 1976 HAS NOT BEEN RULED UPON BY THIS COURT

Defendant Spiegel filed a Motion for Judgment of Acquittal and/or Arrest of Judgment, together with Exhibits, on June 11, 1976. Same has not yet been ruled upon by this Court. We ask that a ruling be issued at the earliest possible moment. Such a ruling is required under local and Federal Rules in order for defendant to become fully cognizant of his legal standing and its attendant rights and remedies.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, COOK & KADISH

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND

[1405]

/s/ Mark J. Kadish
MARK J. KADISH

/s/ Frank Joseph Patrella
FRANK JOSEPH PATRELLA

ATTORNEYS FOR DEFENDANT SPIEGEL

1012 Candler Building
Atlanta, Georgia 30303
Phone 577-2225

EXHIBIT "A"

[1406] AFFIDAVIT

GEORGIA, FULTON COUNTY

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, MARK J. KADISH, who, on oath, deposes and states:

This Affidavit is filed in response to the contentions of Government counsel set forth in Paragraphs 17, 18, 19, 20, 21 and 22 of Government's Response Opposing Defendant Spiegel's Motion to Dismiss the Motion for Reconsideration.

The undersigned does not deny that he had a telephone conversation with Mr. Gaffney on or about April 20, 1977, wherein he advised Mr. Gaffney that he could have the time necessary for filing its Brief in Support of Motion for Reconsideration. However, at no time did I expect Mr. Gaffney to take more than 35 days to file his brief.

On May 6, 1977, approximately two weeks after this telephone call, I met with Mr. Gaffney, Mr. Thompson and Your Honor in Chambers to discuss that status of the Motion for Reconsideration. On the day prior to this conference, May 5, 1977, I advised Mr. Gaffney by telephone that I had conferred with Mr. Spiegel, and that it was his position, and, therefore, mine as his lawyer, that the sixty-day period for retrial was running, and that Defendant Spiegel would not waive any Speedy Trial Act provisions inuring to his benefit. It was my state of mind on May 5 that since Mr. Gaffney had given me no reason for not filing his brief in the ensuing two-week period, April 20 and May 5, 1977, that I could not extend any further professional courtesy vis-a-vis his briefing schedule.

[1407] Therefore, at the May 6, 1977 conference, I made it clear to all assembled that I, on behalf of Mr. Spiegel, would take the position that the sixty-day period for retrial was running, and that the Government needed to file its brief quickly. I further stated that although I was expected to be on trial before Your Honor all of the following week, I would not require any additional time to file a responsive brief since I had taken the position that the sixty-day period for retrial was running. As a result of this conference, Your Honor advised Mr. Gaffney to have his brief completed and filed by May 10, 1977 and he agreed to do so. May 10 was a Tuesday. Your Honor also ordered that Defendant Spiegel's brief be filed by Friday, May 13, 1977.

On the evening of May 6, 1977, I was hospitalized and ordered not to work for a week by my doctor. However, I at no time requested an extension of time to file my brief. Thereafter, on several occasions I conferred with Mr. Gaffney about the fact that he had not filed his brief on time and had not obtained an extension of time. I told him, in essence, that he was at his peril as far as the Speedy Trial was concerned.

I finally received a copy of Mr. Gaffney's brief on May 26, 1977, and my responsive brief, under Local Rules, would be due Monday, June 6, 1977. I requested today and was granted today a one-day extension of my brief until June 7, 1977. I intend to file my brief no later than close of business on June 7, 1977.

/s/ Mark J. Kadish
MARK J. KADISH

Sworn to and subscribed before me,
this the 6th day of June, 197[illegible].
/s/ Earnie F. New
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Dec. 3, 1978

[1408] AFFIDAVIT

GEORGIA, FULTON COUNTY.

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, EDWARD T. M. GARLAND, who, on oath, deposes and states:

This affidavit is filed in response to the contentions of counsel for the Government in paragraph 15 of Government's Response Opposing Defendant Spiegel's Motion to Dismiss the Motion for Reconsideration. In paragraph 15 of this pleading, a contention is made that on behalf of Spiegel that I stated that I would not insist on an immediate retrial. At no time have I waived with this Court or with the United States Attorney any right of the defendant Spiegel to assert any rights subsequent to this Court's grant of the Motion for New Trial on April 14. The discussions referred to with Mr. Gaffney on April 15th were generalized discussions which did not involve the taking of legal positions by either side in this controversy. There were wide-ranging, generalized discussions. I made it clear during these conversations that I in no way was certain of what legal positions would be asserted by my law firm or myself on behalf of the defendant Spiegel in connection with the government's efforts against defendant Spiegel. At that point, counsel for the Government, Mr. Gaffney, stated that he intended to appeal the Court's order. There was not pending any motion for reconsideration. Any discussions that I had related to the multiple conflicts which I had personally and which the law firm had on its trial schedule. Mr. Gaffney observed that he probably would not retry Spiegel if he were unsuccessful in getting a reversal on appeal to the Fifth Circuit. Any comments made by me concerning an immediate retrial were in the context that any new trial would take place after an appeal by the Government. There was no discussion nor implied agreement to waive any rights of the defendant [1409] Spiegel and it was clearly

stated by me that I would have to confer with my partner, Mark Kadish, and with Spiegel in order for us to determine what our position would be in light of the Government's contentions that they intended to appeal to the Fifth Circuit. I did not at that time believe that the Government could appeal to the Fifth Circuit; however, I was content to have them attempt to do so as they asserted they intended to do. If the Government chose to appeal and could not and intended not to retry if they were unsuccessful, obviously that would have been beneficial to my client. I make no statement to deter the government in their efforts to seek an unavailable remedy when they had asserted that the consequence of failing in their remedy would be not to retry my client.

In paragraph 27, Mr. Gaffney asserts that he informed me that the Government would not be filing its brief on May 10th and that I expressed no opposition at that time to the failure of the Government to file its brief. I asked Mr. Gaffney *when* his brief would be filed. I did not undertake to scold him or to counsel him concerning what steps we would take in those initial conversations; however, I did state in later conversations when he continued to fail to abide the order of the court in the filing of the brief that we would find it necessary to file such a motion. Inspite of that caution, he still failed to file his brief nor were we notified of any alleged informal extension of this Court's order by him or the Court. I did not need to express opposition to his open disobedience of the order of the Court. The failure to abide the court order was known to Mr. Gaffney and he did not need me calling it to his attention to alert him to the requirements to abide a lawful order of the court.

/s/ Edward T. M. Garland

Edward T. M. Garland

Sworn to and subscribed before me,
this 6th day of June, 1977.
/s/ Earnie F. New
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Dec. 3, 1978

EXHIBIT "B"

[1410] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 27,972
STANLEY SPIEGEL, ET AL	:	

MOTION FOR HEARING

The United States of America, by its undersigned attorneys, John W. Stokes, Jr., United States Attorney, Northern District of Georgia, and William P. Gaffney, Assistant United States Attorney, moves for a hearing on the issues raised in the Motion for Reconsideration and the brief supporting it. In support of this motion the government shows the following:

1.

This was a criminal trial which lasted 10 weeks in 1974. The court's pending order granting a new trial has a substantial impact on this district, its litigants, and the public, as well as the government.

2.

The pending order is contrary to law and strongly against the interests of justice. In this regard see the government's brief in support of the motion for reconsideration.

3.

The government is foreclosed from taking a direct appeal from the order granting a new trial; and hence will be deprived of an appellate review of the erroneous action now taken by the district court.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the within and foregoing Response of Defendant Spiegel to Government Brief in Support of Motion for Reconsideration and Supplemental Response to Government Motion for Reconsideration upon Mr. William Gaffney, Assistant United States Attorney, by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 7th day of June, 1977.

/s/ Mark J. Kadish
MARK J. KADISH

APPENDIX I

[1411] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA)
) CRIMINAL ACTION
vs.)
) NO. 27,972
STANLEY SPIEGEL, ET AL.)

FILED: June 8, 1977

DEFENDANT STANLEY SPIEGEL'S REPLY TO GOVERNMENT RESPONSE OPPOSING DEFENDANT SPIEGEL'S MOTION TO DISMISS THE MOTION FOR CONSIDERATION AND MEMORANDUM OF LAW IN SUPPORT HEREOF

Now comes defendant, STANLEY SPIEGEL, through counsel, and shows the Court the following:

1.

Although the Government implies in paragraphs 3, 4, 5, 6, 7 and 8 that defendant Spiegel somehow did not obtain timely extensions at various points in this litigation between August 23, 1974, and May 11, 1976, a careful examination of the docket sheet, a copy of which is attached hereto as Exhibit A and underlined in the relevant places, demonstrates that defendant Spiegel has consistently obtained extensions of time by formal Court order. No such formal extension of time was obtained by the Government between May 10, 1977, when its brief was due, and May 26, 1977, date on which it was hand delivered to counsel Kadish.

2.

Paragraphs 15, 17, 18, 19, 20, 21 and 22 of Government's brief have been responded to in the affidavits of Attorneys Mark J. Kadish and Edward T. M. Garland, which affidavits were filed as Exhibit A to defendant Spiegel's response to government brief in support of motion for reconsideration and supplemental response to Government's motion for reconsideration and are attached to the [1412] instant reply as Exhibit B.

3.

Therefore, the Government's response opposing defendant Spiegel's motion to dismiss the government's motion for reconsideration is unsatisfactory in that it fails to justify the lengthy delay in filing its brief. Furthermore, the Government's response itself admits that no formal extension of time was ever granted by Your Honor, and to this day no formal extension has been adjudicated. This should be compared with the formal extensions of time obtained by defendant Spiegel at all times during the pendency of this litigation.

4.

It is submitted that the local Rules of this Court and the Federal Rules of Criminal Procedure do not countenance the informal manner in which the Government has herein proceeded.

WHEREFORE, for all of the foregoing reasons, defendant Spiegel respectfully prays that his motion to dismiss the Government's motion for reconsideration be granted.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

/s/ Edward T. M. Garland
Edward T. M. Garland

/s/ Mark J. Kadish
Mark J. Kadish

/s/ Frank Joseph Petrella
Frank Joseph Petrella

1012 Candler Building
Atlanta, Georgia 30303
404/ 577-2225

[1413] CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Defendant Stanley Speigel's Reply to Government Response Opposing Defendant Spiegel's Motion to Dismiss the Motion for Consideration and Memorandum of Law in Support Thereof upon Assistant United States Attorney, William Gaffney, by personally delivering a copy of same to him.

This 8th day of June, 1977.

/s/ Mark J. Kadish
Mark J. Kadish

APPENDIX A-1

[1] CRIMINAL DOCKET
UNITED STATES DISTRICT COURT 27972

	TITLE OF CASE	ATTORNEYS
	THE UNITED STATES	For U.S.:
	vs.	P. Bruce Kirwan
	1. STANLEY SPIEGEL 525 Park Ave., N.Y., N.Y. 10021	
	2. EDWARD T. CARROLL 6648 Ptree Ind. Blvd, Doraville 30340	
	3. ALLAN M. HOLLOWAY 2930 Blue Sky Pl, Mtta, Ga. 30060	
8-17-74	4. JOSEPH W. LAWSON 1160 Martin Ridge Rd, Roswell 30075	For Defendant:
	5. ALLEN E. PERKINS 1017 Drexel Parkway Bham, Ala. 35209	(See address docket)
8-17-74	6. JAMES MELVIN HOLLOWAY 254 Chestnut St, Pensacola, Fla. 1521 Plaza Dr, No. 249 Garland, Texas 75040	

STATISTICAL RECORD	COSTS
J.S. 2 mailed 1-23-73	Clerk
J.S. 3 mailed	Marshall
Violation Conspiracy; to wit; devise a mail fraud Title 18	Docket fee
Sec. 371 & 1341 scheme and use of mail, to execute same	

19 DATE 73	PROCEEDINGS
Jan. 23	Criminal Indictment in Thirty-three counts, filed.
	Re ALL DEFTS: Praecipes, filed. Warrants issued and delivered to USM. w/out surety
Jan. 31	Re PERKINS: $10,00 Appearance Bond 1-26-73. filed.
Jan. 31	Re SPIEGEL, CARROLL, A. HOLLOWAY. LAWSON, J. HOLLOWAY: $10,000 Appearance Bond bond, filed. W/out surety.
Feb. 1	Re SPIEGEL: Marshal's return on warrant executed 1-24-73, filed.
	Re PERKINS: Marshal's return on warrant executed 1-26-73, filed.
	Re CARROLL: Marshal's return on warrant executed 1-24-73, filed.
	Re HOLLOWAY: Marshal's return on warrant executed 1-26-73, filed.
	Re A. HOLLOWAY: Marshal's return on warrant executed 1-26-73, filed.
	Re J. LAWSON: Marshal's return on warrant executed 1-26-73, filed.

19 DATE 73	PROCEEDINGS
Feb. 2	ARRAIGNMENT: Re SPIEGEL: Plea of NOT GUILTY, filed (60 days to file motion) Motion for extension pursuant to Rule 12- filed. Re PERKINS: Plea of NOT GUILTY, filed (60 days to file motion.) RE AL HOLLOWAY: Plea of NOT GUILTY, filed (60 days to file motion.) Re J. M. HOLLOWAY; Plea of NOT GUILTY, filed (60 days to file motion.)
[2] Feb. 2	ARRAIGNMENT (cont'd) Re LAWSON: Plea of NOT GUILTY, filed (60 days to file motion.) Re EDWARD CARROLL: Plea of NOT GUILTY, filed (60 days to file motion.) Re ALL DEFTS.: 60 days to file motions GRANTED orally.
Mar. 7	Re Lawson: Request for inspection and copying of documents, filed.
Mar. 30	Re A. HOLLOWAY: Motion for extension of time to file motions, filed. J. HOLLOWAY (to RCF) and PERKINS.
Mar. 30	Re A. M. HOLLOWAY, J. M. HOLLOWAY, And A. E. PERKINS: Motion for order compelling disclosure and production of evidence by the defts, filed. Affidavits in support of defts. motion for discovery, filed. memorandum of law in support of motion for discovery and inspection, filed. Motion for bill of particulars by the defts, filed. Affidavit in support of motion for bill of particulars, filed.

19 DATE 73	PROCEEDINGS
	Memorandum of law in support of motion for bill of particulars filed. Notice of motion for discovery and inspection and for bill of particulars, filed. Certificate of service on above, filed.
Apr. 2	Re LAWSON: Motion for production of documents and for inspection and copying with brief in support, filed.
Apr. 3	Re SPIEGEL: Motion for pre-trial conference with brief in support, filed. Motion for bill of particulars, with brief in support, filed. Motion for production of evidence favorable to the accused under the provisions of U.S. -vs- Eley, U.S. -vs- Houston, and U.S. -vs- Porter with brief in support, filed. Motion for discovery and inspection under Rule 16(b) with brief in support, filed. Motion to compel discovery of Jencks Act Material with brief in support, filed. Motion for reciprocal discovery with brief in support filed. Motion for severance of defendant, with brief in support, filed. Defendant Spiegels motion to adopt and join all motions entered by other defendants which would be beneficial to him, filed.
Apr. 2	Re HOLLOWAY, HOLLOWAY AND PERKINS: Order allowing defendants 30 days after disposition of motions to compel disclosure, production of evidence and motion for bill of particulars, USA having no objection filed. (cc: USA and counsel.)

19 DATE 73	PROCEEDINGS
Apr. 2	Re SPIEGEL: Order allowing defendant 15 days for filing of motions relating to Grand Jury, filed (USA and counsel)
Apr. 3	Re SPIEGEL: Transcript of proceedings of 1-3-73, filed.
Apr. 12	Re LAWSON: Govt's. response to Defendants motion for production of documents and for inspection and copying, filed.
	SUBMITTED TO JUDGE MOYE ON DEFENDANT LAWSON'S MOTION FOR INSPECTION AND COPYING OF DOCUMENTS.
Apr. 18	Re LAWSON: ORDER DENYING defendant's motion for production of documents, filed. (cc: USA and counsel)
[3] Apr. 19	Re HOLLOWAY, PERKINS AND HOLLOWAY, JAS.: Govt's. motion for extension of time, up to and including 4-20-73, in which to respond to de motions, filed. Order allowing same, filed. (cc: USA & counsel)
Apr. 18	Re SPIEGEL: Deft's. motion to dismiss the indictment with brief in support, filed.
Apr. 27	Re HOLLOWAY, PERKINS AND HOLLOWAY: Govt's motion for extension of time, up to and including May 1, 1973, in which to respond to d motions, and Order allowing same, filed. (cc USA & counsel)
May 2	Re A. HOLLOWAY: Motion for a Speedy trial, filed.
May 2	SUBMITTED TO JUDGE MOYE ON PENDING MOTIONS.
May 3	Motion for extension of time, up to and including May 7, 1973, in which to respond to deft's. motions, filed. Order allowing same, filed. Re SPIEGEL, A. HOLLOWAY, A. PERKINS, J. HOLLOWAY. cc: USA, Counsel, (to CAM)

19 DATE 73	PROCEEDINGS
May 8	Govt's. Memorandum in answer to defendants' motions. (to CAM)
May 8	Re SPIEGEL: Govt's Memorandum in answer to deft's. motions. (to C
May 17	Re CODY: Motion to change plea and order allowing same, filed.
	Plea of GUILTY, filed.
	SENTENCE: G.A.G. TWO (2) YEARS Court recommends Atty. General to designate State Institution as place of serv. of this sentence.
May 22	Re SPIEGEL: Deft's. motion for extension of time in which to re to Govt's. response to motions, filed. (to CAM)
May 30	Re: A. HOLLOWAY, J. HOLLOWAY AND PERKINS: Order DENYING Defts'. m to compel and for discovery w out prejuice as to their right to make the motions after having complied with Eley: as to motion for bill of particulars: DENIED as to 7 & 13, DENIED as to 9 & 15. DENIED, as to 10 and 11, DENIED as to 16. DENIED as to 17 & 18, DENIED as to 20 thru 51 and GRANTED as to 6,8,9,12,14 and 15 within limitations (see order); other no. Re A. HOLLOWAY: DENIED as to motion for speedy trial pursuant to 6th Amendment and Rule 48(b), FRCP;
	Re SPIEGEL: As to motion to adopt other motions filed, GRANTED DENED as same as co-defts'. motions.
	As to motion to sever, DENIED w/out prejudice to his right to bring motion again at trial; as to motion discovery. DENIED,

19 DATE 73	PROCEEDINGS
	Re Eley however, Govt. is directed to su certain evidence to the court for in camera inspection ruling on motion for discovery is therefore DEFERRED to motion for reciprocal discovery, DENIED; as to m for pretrial discovery of Jencks Act, DENIED; as to for bill of particulars, No. 1, GRANTED, Nos. 4 & 5 DENIED (see Nos. 6,8,12 & 14 of co-defendant's), Nos. 7 thru DENIED, No. 39, DENIED; as to motion for pretrial dis being unopposed, GRANTED; motion for pretrial conference being unopposed, GRANTED, hearing set for 9:30 A.M. 9-5-73; as to motion to dismiss the indictment, Gov submitted no response, is afforded 10 days to respond to motion of deft. requesting time to respond to govt's response, DENIED, filed. (cc: USA, Messers. Nodvin Garland)
Jun. 11	Re SPIEGEL: SUBMITTED TO JUDGE MOYE ON DEFTS. MOTION TO DISMISS ORDER 5-25-73.
[4] Jun 11	Re SPIEGEL: Motion for extension of time for filing defts. responses to the govt's. responses to deft's. motion to dismiss indictment, filed (to CAM)
June 25	Re SPIEGEL: Govt's response in opposition to deft Spiegel's motion to dismiss indictment, filed. (to CAM)
June 28	Re SPIEGEL: Motion for extension of time to file supplemental brief in support of motion to dismiss the indictment and respond to Govt's. response, filed. Order allowing deft. up to and through July 11, 1973 to briefs and response, filed. (cc: counsel and U.S.A.)

19 DATE 73	PROCEEDINGS
June 28	Re SPIEGEL: Motion of deft. Stanley Spiegel for leave to file further pre-trial motions, Memorandum in support, filed. Motion of deft. Spiegel for production of Grand Jury vote voting procedures, Memorandum in support, filed. Motion of deft. Spiegel to impound and preserve any and all notes and records of postal inspectors relevant to the indictment, Memorandum in support, filed.
July 10	Re SPIEGEL: Motion to comply, filed.
July 11	Re SPIEGEL: Order allowing defendant up to and through July 26, to file supplemental brief, filed.
July 23	Re SPIEGEL: ORDER allowing defendant up until and through 8-15-73 to file supplemental brief, filed. (cc: USA and counsel) CAM
July 27	Re SPEIGEL: Steno notes of 1-24-73, filed.
Aug. 8	Pretrial conference rescheduled for 10-25-73 at 9:30 A.M, counsel not
Aug. 27	Re SPIEGEL: ORDER allowing defendant up to and through 8-25-73 in which to file supplemental brief, filed. CAM
Aug. 27	Re HOLLOWAY: Letter advising that deft. has moved from Pensacola, Fla., filed.
Aug. 27	Re SPIEGEL: Supplemental brief in support of the defendants motion to dismiss, filed. (to CAM)
Sept. 26	Re SPIEGEL, et al: Came on for status- pre-trial hearing before Judge Moye. Verbal motion by Worsbe for continuation: ruling de by Court until 10-25-73. Court directed USA and Attorney to file brief within one week

19 DATE 73 PROCEEDINGS

on preameters of speedy trial USA directed to comply with Court's Orders regarding disc by end of week.

Sept. 26 Re SPIEGEL: ORDER DENYING defendant's motion to dismiss the indictment, filed. (cc: USA and to counsel. (to Mr. Sparks for Govt.)

Oct. 4 Re SPIEGEL: Motion of Stanely Spiegel concerning mail cover, filed. Brief in support of same, filed.

Oct. 19 Re SPIEGEL: SUBMITTED TO JUDGE MOYE ON DEFTS. MOTION CONCERNING MAIL COVER.

Oct. 24 Re A.M. HOLLOWAY: Motion to dismiss and for other relief, filed.

Re J. M. HOLLOWAY: Motion to dismiss and for other relief, filed.

Re A. E. PERKINS: Motion to dismiss and for other relief, filed.

Re PERKINS, HOLLOWAY & HOLLOWAY: Brief in support of motions to dismiss, filed.

Oct. 26 Re ALL DEFTS: Came on for Pre-Trial Conference. Court verbally direct USA to respond to Defts'. motion regarding "mail cover" within 5 days; Court verbally OVERRULED Mr. Nodvins motion to dismiss based on noncompliance with discovery procedure. Court directed counsel to meet and discuss procedure of on Tuesday 10-30-73 at 10:00 A.M. in U.S. Atty's. office. Mr. Garland verbally moved for OMbusman procedure to be [5] verbally DENIED by Court. Court will hold another

19 DATE 73 PROCEEDINGS

hearing on November 16, 1973 at 4:00 P.M.

Memorandum of Law: Speedy Trial, filed.

Memorandum of U.S.A., filed.

Re ALLAN HOLLOWAY, JAMES HOLLOWAY and PERKINS: Statement of Facts, filed.

Nov. 2 Re S. SPIEGEL: Govt's. response to motion of Stanley Spiegel concerning mail cover, filed.

Nov. 2 Re S. SPIEGEL: SUBMITTED TO JUDGE MOYE ON GOVT:S. RESPONSE TO MOTION CONCERNING MAIL COVER.

Nov. 9 Re SPIEGEL: ORDER dismissing motion concerning mail cover, filed. (CAM) (cc: USA and counsel)

Nov. 10 Re SPIEGEL: In-Camera hearing held. Steno notes sealed as per verbal order of the court, filed.

Further pretrial hearing set for 11-30-73 at 4:00 P.M.

Nov. 29 Re SPIEGEL: Supplemental motions for discovery, filed.

Brief in support, filed.

Nov. 30 Re SPIEGEL: Came on for further pretrial hearings. With consent of all counsel, motion for speedy trial withdrawn from this day forward. Case removed from 1-28-74 trial calendar and to be reset at future date. CAM

Dec. 18 Re SPIEGEL: SUBMITTED TO JUDGE MOYE ON DEFTS. MOTION FOR DISCOVERY

Dec. 19 Re SPIEGEL: Govts. response; to supplemental motion for discovery filed. (TO CAM)

Dec. 21 Re SPIEGEL: Order DENYING supplemental motion for discovery, filed.

1974 PROCEEDINGS

Jan. 8	Re A. M. HOLLOWAY: Motion to be allowed to withdraw as counsel, filed.
	Letter to deft. pursuant to Local Rule 1-G (cc USA, counsel)
Jan. 21	Re A. M. HOLLOWAY: SUBMITTED TO JUDGE MOYE ON MOTION TO WITHDRAW AS COUNSEL.
Jan. 21	Re J. M. HOLLOWAY: Motion for leave to withdraw as counsel (by Nodvin & Zuckermen), filed.
	Letter to deft. pursuant to Local Rule 71.7, (cc USA, counsel) (reg mail)
	Re A. E. PERKINS: Motion for leave to withdraw as counsel (by Nodvin & Zuckerman), filed.
	Letter to deft. pursuant to Local Rule 71.7, (cc USA, counsel) (reg mail)
Jan. 31	RE J. M. HOLLOWAY & A. E. PERKINS: MOTIONS TO WITHDRAW AS COUNSEL SUBMITTED TO JUDGE MOYE.
Mar. 4	RE HOLLOWAY, HOLLOWAY AND PERKINS: Came on for hearing on Mr. Nodvin's motion to withdraw as counsel for the defendants and for substitution of Mr. John McGuigan as counsel; court granted motion.
Mar. 14	Re: SPIEGEL, et al, court reporter's steno notes of 3/4/74, filed.
Mar. 14	Re: SPIEGEL, et al, court reporter's steno notes of 11/30/73, filed.
Mar. 14	Re: SPIEGEL, et al, court reporter's steno notes of 11/16/73, filed.

19 DATE 74 PROCEEDINGS

May 31	Re SPIEGEL, et al: Govt's. Response to Motion to Preserve Noted, filed.
	Affidavit, filed. Govt's. Response to Motion for Production of Grand Jury Vote and Voting Procedure, filed.
	Notices of jury trial 6-10-74 and pre-trial conference 5-31-74 mailed by U.S. Magistrate on 5-22-74 to Mr. Garland, Mr. Hester, Mr. McGuigan, Mr. Tate by Reg. Mail and to Mr. Gaffney on 5-24-74.
[6] June 3	Re SPIEGEL:
	ORDER DENYING motion to impound and preserve any and all notes of postal inspectors relevant to instant indictment (postal inspectors having been made aware and preserved named materials for pre-trial in-camera inspection), filed. (cc: USA, counsel) CAM vtb
	Re SPIEGEL: ORDER allowing defendant and his attorney to examine the "concurrence slip" filed by foreman and members of the grand jury as required by Rule 6(c): motion for production and disclosure of the grand jurors names and voting procedure DENIED, filed. CAM vtb
	Re ALL DEFTS: Came on for pre-trial conference before Judge Moye: Case set for trial June 10, 1974.
	Verbal motion by Deft. Spiegel to renew motion to sever; verbally OVERRULED by Court. Case and procedure at trial discussed. Order to be rendered. vtb
June 4	Motion of Stanley Spiegel to Suppress Tape Recordings, filed.
	Memorandum in support, filed. vtb
	(Complete file before Judge Chancey for Judge Moye) vtb

19 DATE 74 PROCEEDINGS

June 4 Form of subpoena to produce document or object, filed.
Motion of Stanley Spiegel to Dismiss the Indictment because of the failure of the United States to Comply with the Court's Discovery Orders, filed Memorandum in support, filed. vtb

June 5 Government's List of Supplemental Witnesses, filed. (to ACL) vtb

June 5 Came on for pre-trial conference before Judge Moye, Court ordered that all criminal records of Govt. Witnesses be furnished to defendant Spiegel by 4:00 P.M. 6-574; Court further ordered that Govt. counsel pull out of their files all documents that defendant Spiegel should not see and show remaining file to deft. Spiegel by 3:00 P.M., 6-5-74.
Court OVERRULED Deft. Spiegel's motion to Dismiss on grounds set-forth in Brady -vs- Maryland.
Court ORDERED sealed transcript notes opened for inspection - to be resealed by Clerk and placed in vault (Drawer 12).
Expert Report - If Counsel for Govt. has or will have reports of experts notify Court and a ruling will issue. Witness List filed. vtb

June 7 Re CARROLL: Motion to change plea and order allowing same, filed.
Negotiated plea of GUILTY to count 20, filed.
Notice of sentencing date 7-25-74 to deft., counsel, USA, USM, Prob. and Clerk. vtb

June 10 Re SPIEGEL, HOLLOWAY, LAWSON, PERKINS, JAMES HOLLOWAY, CAME ON FOR JURY TRIAL BEFORE JUDGE MOYE: Waiver of alternate juror with approval of Court, filed.

19 DATE 74 PROCEEDINGS

Proposed Voir Dire Questions from Spiegel. filed.
Motion for a Preliminary Charge, filed. Cont'd. vtb

June 11 JURY TRIAL CONT'D: Stipulation regarding check for $7,500.00, filed. Exhibits admitted. Cont'd.

June 12 Re HOLLOWAY: Petition to Enjoin Marvin P. Nodvin, et al from Conducting Discovery in Civil Litigation untill all proceedings of this Court are concluded, filed.
ORDER directing Attorney Marvin P. Nodvin to show cause at 4:30 P.M. on June 13, 1974, why he should not be so enjoined, filed. (cc: USA, USM (to serve Mr. Nodvin) to Mr. McGuigan vtb

June 12 Re SPIEGEL, HOLLOWAY, LAWSON, PERKINS, JAS. HOLLOWAY: JURY TRIAL CONT'D. Counsels for all defts. verbally moved for mistrial: verbal OVERRULED by Court. Outside the presense of the Jury, Jurors Helen McSwain and Harvey Jones were questioned by Court. (Pa

[7] June 12 cont'd. The Court directed counsel not to contact Mr. McSwain and any attempt to do so would be contempt. Court to give ruling. Cont'd. vtb

June 13 JURY TRIAL COND'D: Deft. Spiegel withdrew all prior motions for mistrial. Juror McSwain was called into open court and testified. Juror Jones was called into open court and testified. Court excused these two jurors. All defense counsel verbally moved to sever and for mistrial - verbally DENIED by Court. Exhibits admitted.

	Hearing held on Mr. McGuigan's motion to enjoin discovery by Mr. Marvin Nodvin in State Court regarding this case; Court verbally GRANTED motion. Cont'd. vtb
June 14	CAME ON FOR JURY TRIAL AS CONT'D: Exhibits admitted. Cont'd. vtb
June 17	JURY TRIAL CONTINUED: Exhibits admitted previously and numbers given changed by motion of Govt.; Spiegel's exhibits admitted. Cont'd. vtb
	ORDER restraining and enjoining Marvin P. Nodvin, Attorney from prosecuting any legal proceedings, by discovery or otherwise, in such fashion as to interfere with the conduct of this litigation, filed. (cc: Mr. Garland, Mr. Hester, Mr. McGuigan, Mr. Tate, Mr. Gaffney, Mr. Nodvin, Clerk, Superior Court of Fulton County) CAM vtb
June 18	JURY TRIAL CONTINUED: Exhibits admitted. Cont'd. vtb
June 19	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
June 20	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
June 21	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
June 24	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
June 25	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
June 26	Recessed for the day.
June 27	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb

June 27	Motions of Attorneys Kevin Martin and Joe Davis, Jr. to Quash Subpoena Duces Tecum served upon them, being attorneys of record in CA 17293 seeking damages from same defts. in this case, filed. (to CAM) vtb
June 28	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 1	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
July 2	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
July 9	Re HOLLOWAY: Marshal's return on order dated 6-12-74, executed 6-12-74, filed. (Motion for Evidentiary Hearing & gjd (Motion to Quash, filed. Cont'd. acl
July 3	JURY TRIAL CONT'D: Exhibits admitted.
July 8	JURY TRIAL CONT'D: Exhibits admitted. Brief and Statement, filed. acl
July 9	JURY TRIAL CONT'D: Exhibits admitted. Court verbally denied ALLAN HOLLOWAY'S, JAMES HOLLOWAY'S, & PERKINS' motion to dismiss. Cont'd. acl
July 10	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
July 11	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
July 12	JURY TRIAL CONT'D: Exhibits admitted. Defendant, Spiegel's Request to Charge, filed, and DENIED by Court. Cont'd. vtb
July 15	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 16	Movants' Reply to Defendant's Motion for Evidentiary Hearing and Response to Motion to Quash Subpoena, filed. (to CAM) vtb

19 DATE 74	PROCEEDINGS
July 16	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 17	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 22	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 23	JURY TRIAL CONT'D: Exhibits admitted. Deft. Spiegel verbally moved for severance and mistrial; verbally OVERRULED motion. Mr. McGuigan, verbally joined the motion; verbally OVERRULED by Court. Cont'd. vtb
July 24	JURY TRIAL CONT'D: Deft. Lawson verbally moved for mistrial; verbally overruled by Court. Exhibits admitted. Cont'd. vtb
[8] July 25	JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
July 26	JURY TRIAL CONT'D: Exhibits admitted. Cont'd until further order. vtb
July 31	ORDER increasing attendance fee of jurors now serving to $30.00 per day, as they have now served a minimum of 30 days, filed. (cc: USA and jury clerk, USM) (Order dated 7-26-74) vtb
July 31	Re SPIEGEL: Motion to Dismiss, filed. Memorandum in Supprt, filed. vtb
July 30	Re SPEIGEL et al: Came on for hearing on Joe Davis' and Kevin Martin's motion to quash subpoenas. Court quashed portions of subpoenas and OVERRULED the motion to quash on portions. CAM. vtb
Aug. 2	Re SPIEGEL, et al: ORDER amending order of 7-26-74 to $25.00 per day rather than $30.00 per day, except for Mrs. Byrne, who is to receive increase after she has served 30 days, filed. (cc: USA, USM, Jury Clerk) vtb

19 DATE 74	PROCEEDINGS
Augs. 5	Re SPIEGEL, et al: JURY TRIAL RESUMED FROM JULY 26, 1974: Outside the presence of the jury, Counsel for deft. Spiegel verbally moved to dismiss and for judgment of acquittal. Court reserved ruling. Counsel for Spiegel verbally moved for severance; verbally OVERRULED by Court. Counsel for all other defendants verbally moved for judgment of acquittal; verbally OVERRULED by Court. On motion of both counsels for Govt. and defendants, Court verbally DISMISSED COUNTS 10 and 28. Exhibits Admitted. Cont'd.
Aug. 6	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Cont'd. vtb
Aug. 7	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Defendant Spiegel's Request to Charge, filed. Defendant Spiegel's motion to strike and dismiss, filed. Motion for mistrial and to strike. Memorandum in support of motion, Motion to dismiss, filed. Memo, filed. Cont'd. vtb
Aug. 8	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
Aug. 9	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
Aug. 12	Re SPIEGEL, et al: JURY TRIAL CONT'd: Juror Mrs. Susan Silver advised the clerk she was sick and not able to attend; The Court and all counsels agreed to proceed with the 11 remaining jurors. Exhibits admitted. Case cont'd. gjd

19 DATE 74	PROCEEDINGS
Aug. 13	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Cont'd. acl
Aug. 14	Re SPIEGEL, et al: JURY TRIAL CONT'D: Exhibits admitted. Outside presense of jury, counsel for all defts. verbally moved for judgment of acquittal. Verbally overruled by the Court. Deft. Spiegel verbally moved to dismiss the indictment. Verbally overruled by the Court. Cont'd. acl
Aug. 15	Re SPIEGEL, et al: JURY TRIAL CONT'D: Deft. Spiegel moved verbally to Dismiss. Verbally DENIED by the Court, exceptions to the charge made and noted Order to feed and lodge filed. The Court informed the jurors that they would be sequestered beginning Aug. 16, 1974. Case cont'd. gjd
Aug. 16	Re SPIEGEL, et al: JURY TRIAL CONT'D. Jury recharged. Deft. Spiegel's additional request to charge, filed. Cont'd. acl Govt's. request that only portion of tape be presented to jury, filed. Memoranda (deft's.), filed. acl
[9] Aug. 17	Re SPIEGEL, et al: JURY TRIAL CONT'D; Deft. Lawson waived presence of counsel. VERDICTS: SPIEGEL: GUILTY to cts. 1-32; NOT GUILTY to ct. 33, filed. AL HOLLOWAY: GUILTY to cts. 1-19, 21, 24, 25, 27-31; NOT GUILTY to cts. 20, 22, 23, 26, 32, 33, filed. MEL HOLLOWAY: NOT GUILTY to all cts., filed. Order of discharge, filed. (cc: USA, Counsel)

19 DATE 74	PROCEEDINGS
	AL PERKINS: GUILTY to ct. 1; NOT GUILTY to cts. 2-33, filed. JOE LAWSON: NOT GUILTY to all cts., filed. Order of discharge, filed. (cc: USA, Counsel) Jury was polled. Sentence date set for 9-27-74. Jury was released. Defts. Spiegel & Al Holloway directed to report to Prob. Office 8-19-74 at 9:00 a.m.; Deft. Perkins directed to report to Prob. Office 8-20-74 at 9:00 a.m. Re SPIEGEL, PERKINS, AL HOLLOWAY: Notice of Sentencing Date 9-27-74 at 2:00 p.m. before CAM (cc: Deft., Counsel, USM, USA, Prob., & Clerk). CAM acl
Aug. 23	Re A. HOLLOWAY & PERKINS, & SPIEGEL: Deft's. Motion for New Trial, filed. acl Re SPIEGEL, et al: Motion to Enlarge the Time for Filing a Motion for New Trial & Other Post-Trial Motions, filed. acl
Aug. 26	Re SPIEGEL: ORDER GRANTING defendant until December 15, 1974 to file Amplification and Amendment of the Motion for New Trial and for the filing of a Motion for Judgment of Acquittal, filed. (cc: USA, Counsels) vtb
Aug. 28	Re SPIEGEL, et al: steno notes of proceedings dated 6-5-74 & 6-13-74, filed. gjd
Aug. 29	Re SPIEGEL: Motion for leave of Court to remove and copy enumerated Government Exhibits (for numbers see motion), filed. Motion for leave of Court to remove and copy enumerated Defense Exhibits (see motion), filed. vtb

19 DATE 74	PROCEEDINGS
Sep. 16	Re SPIEGEL, A. HOLLOWAY & PERKINS: SUBMITTED TO JUDGE MOYE ON MOTIONS FOR NEW TRIAL
	Re SPIEGEL: SUBMITTED TO JUDGE MOYE ON MOTION FOR LEAVE OF COURT TO REMOVE & COPY ENUMERATED GOVT. & DEFENSE EXHIBITS. acl
Sep. 13	Re PERKINS: Deft's. Motion & Affidavit in Support to Proceed on Appeal in Forma Pauperis & ORDER allowing same, filed. acl
Sep. 26	Re SPIEGEL: Order allowing deft to remove and copy certain Govt. Exhibits with the restriction that said documents be returned to the Clerk's office within two hours of their removal, (for numbers of exhibits see order). CAM gjd
Sep. 26	Re ALLAN HOLLOWAY & PERKINS: Order GRANTING defts extension of time in which to file an amended motion for new trial. CAM. cc: USA & defts atty. gjd
[10] Oct. 21	Court reporter's steno notes of proceedings of (6/7/74), filed. dp
Oct. 31	Re SPIEGEL: Motion to dismiss, filed. Memorandum of Law, filed.
	Government Witnesses Directly Affected by Documents found in Withheld Box No. 3, List, filed.
	Supplemental Memorandum of Fact and Law in Support of Motion to Dismiss, filed. vtb
Nov. 5	Re SPIEGEL: ORDERED that within thirty (30) days of the date of the completion of the trial transcript, the Government shall

19 DATE 74	PROCEEDINGS
	submit its responses to the pending Motions to Dismiss; and that defendant shall have fifteen (15) days from that date to respond, thereafter, the Court will have an evidentiary hearing on the pending Motions to Dismiss, filed. (cc: USA and counsel) CAM vtb
	ORDER allowing the Government ten (10) days to respond to Motion to Dismiss on grounds of letter from Edward T. Carroll, filed. CAM (cc: USA and counsel) vtb
Nov. 11	Re SPIEGEL: Response to Deft. Spiegel's Motion to Dismiss, filed.
	SUBMITTED TO JUDGE MOYE ON DEFT. SPIEGEL'S MOTION TO DISMISS. acl
Nov. 13	Re SPIEGEL: ORDER DENYING Motion to Dismiss, filed. (cc: USA and to each counsel) vtb
Nov. 22	Re HOLLOWAY: ORDER dissolving protective order rendered on 6-13-74. filed. CAM (cc: USA and counsel) vtb
Nov. 27	Re SPIEGEL: ORDER directing that Exhibit C be re-sealed, to be re-opened only upon order of this Court or appropriate appellate court, filed (cc: USA and counsel) vtb
1975	
Jan. 27	Re SPIEGEL: Motion for Grand Jury Charge, filed. vtb
FEB. 11	SUBMITTED ON DEFT SPIEGEL'S MOTION FOR GRAND JURY CHARGE. skb

Feb. 18	Re SPIEGEL: ORDER GRANTING defendant's unopposed motion for grand jury charge, pursuant to Local Rule 91.2, filed. (cc: USA and counsel, also court reporter) vtb
Mar. 13	Steno notes of proceedings dated July 15, 16, 17, 22, 23, 24, 1974 and August 14, 1974, filed. gjd
April 1	Transcript of proceedings dated July 8, 1974; July 9, 1974; July 10, 1974; July 11, 1974; and July 12, 1974, filed. dwp
April 2	Transcript of proceedings dated June 24, 1974; June 25, 1974; June 27, 1974; June 28, 1974; July 26, 1974; and August 12, 1974, filed.
April 18	RE: ALAN M. HOLLOWAY: Letter pursuant to Local Rule 71.7 as to Attorney John McGuigan, filed. Copies to USA, counsel, and defendant.
Apr. 28	SUBMITTED TO JUDGE MOYE ON REQUEST OF JOHN McGUIGAN TO WITHDRAW AS COUNSEL FOR DEFT ALAN M. HOLLOWAY.
May 15	Re PERKINS: Request of John McGuigan to withdraw as counsel, filed. (Advise to comply with Local Rule 71.7) (Submit on Perkins & Holloway when complied with)
May 20	Steno notes of proceedings dated July 8, 9, 10, 11 & 12, 1974, filed.
May 21	Transcript of proceedings of 7-15-74, 7-16-74, 7-17-74, 7-22-74, 7-23-74, 7-24-74, 8-14-74, filed.
July 1	Transcript of proceedings dated 6/14/75, filed.
Sept. 16	Steno notes of proceedings dated 6-27-74, 7/25/74, 7/26/74, and 8/12/74, filed.
Sept. 22	Transcript of proceedings dated 6-17-74 and 6-18-74, filed.

Oct. 28	Transcript of proceedings 6-19-74 and 6-20-74, filed. jsr
	Transcript of proceedings 8-5-74, 8-12-74, 8-15-74, 8-16-74, and 8-17-74, filed. jsr
Nov. 19	Court reporter's transcript of proceedings dated 6/20/74, 6/21/74, 7/1/74, 7/2/74, and 7/3/74, filed. dwp
Dec. 23	RE: SPEIGEL' Defendant's Request for ruling on the re-issue of defendant's failure to waive the selection of an alternate juror, prior to the filing of an amended Motion for New Trial, filed. SUBMITTED TO JUDGE MOYE ON DEFENDANT'S REQUEST. dwp
1976	Jan. 22: Letters from Mark Kadish and Roger Thompson, re transcripts. vtb
Jan. 26	Court reporter's steno notes of the proceedings dated June 20 & 21, 1974, July 1-3, 1974, 6-20-74, filed. jld
	Court reporter's steno notes of the proceedings dated 6-10-74, 6-11-74, 6-12-74, 6-13-74, 6-14-74, 6-18-74, 6-19-74, 6-20-74, 8-5-74, 8-12-74, 8-15-74, filed. jld
Jan. 30	Transcript of proceedings dated June 13, 1974, filed. jsr
Feb. 3	Transcript of proceedings dated 6-10-74, 6-11-74, and 6-12-74, filed. jsr
Feb. 6	Court reporter's transcript of the proceedings dated 11-16-73, 11-30-73, 6-3-74, 6-5-74, filed. jld
Mar. 23	Court reporter's transcript of proceedings of 7-24-74, 8-6-74, 8-7-74, 8-8-74, filed. vtb
Mar. 26	ORDER, dated 3/24/76, allowing defendant STANLEY SPIEGEL to have 45 days from the date of this Order to file his Motion for New

19 DATE 76 PROCEEDINGS

Trial and a Memorandum of Law in support thereof, and that the United States Attorney shall have thirty (30) days from the date of the filing of said Motion for New Trial and Memorandum of Law in support thereof, to submit its response, filed. CAM (cc: USA & counsel) dwp

April 6 RE: Spiegel: Defendant's Motion relating to Grand Jury Proceedings with Memorandum of Law in Support, filed. jld

April 16 RE SPIEGEL: SUBMITTED TO JUDGE MOYE ON DEFENDANT'S MOTION RELATING TO GRAND JURY PROCEEDINGS. jld

April 29 RE: SPIEGEL: Government's Response to Motion Relating To Grand Jury Proceedings, with Brief in Support, filed. (TO CAM) . . . . .jld

May 3 RE ALL DEFTS.: ORDER correcting mistake in record of hearings to show that the hearing in RE STANLEY SPIEGEL v. JOHN STOKES, et al, took place on Jan. 23, 1973 rather than Jan. 24, 1973, and DENYING defts.'s request for production of matters relating to postal inspector's testimony before the grand jury, filed. aea

cc: USA, counsel, & court reporter aea

May 13 Court reporter's transcript of the proceedings, dated Aug. 9, 1974 and Aug. 13, 1974 (2 vols.), filed. clh

May 17 Letter, dated May 12, 1976, from J. Roger Thompson, to CAM confirming conversation of May 11, 1976, in which agreement was made to allow thirty (30) days from May 11, 1976, for the filing of the amended Motion for New Trial as to all defendants, with Judge Moye's approval, filed. dwp

Bill Gaffney advised by telephone conversation on 5/17/76. dwp

19 DATE 76 PROCEEDINGS

May 24 ORDER, dated 5/21/76, directing that the Defendant's Motion for New Trial, and other post-trial motions, shall be filed no later than June 11, 1976; that the Government shall have thirty (30) days to respond thereto, and to Defendant Spiegel's pending Motion to Dismiss; and that within fifteen (15) days from the date the Government files its response Defendants shall have fifteen (15) days to reply to the Government's Response to Defendants Motion for New Trial, other post-trial motions, and Defendant Spiegel's Motions to Dismiss, filed. CAM (cc: all counsels & USA) dwp

[12] June 11 RE: HOLLOWAY AND PERKINS: Defendants' Amended Motion for New Trial, filed. Brief in Support, filed. Certificate of service dated 6-11-76, by hand. jld

1. RE: SPIEGEL: Defendant's Motion for Judgment of Acquittal and/or Arrest of Judgment, filed. Memorandum of Fact and Law in Support, filed.
2. Defendant's Exhibits to Memorandum in Support of Judgment and/or Arrest of Judgment, filed.
3. Defendant's Motion for New Trial, filed. Memorandum of Fact and Law in Support, filed.
4. Defendant's Exhibits to Memorandum in Support of Motion for New Trial, filed. Certificate of service dated 6-11-76, by hand. jld

July 15 RE: SPIEGEL, HOLLOWAY & PERKINS: Government's Motion for extension of time for the filing of its response to defendant Spiegel's

Motion for New Trial and Motion for Judgment of Acquittal and/or arrest of judgment; and defendants Holloway and Perkins' Amended Motion for New Trial, requesting extension for time up to and including August 6, 1976, and ORDER, dated 7/15/76, allowing counsel for the U.S. to have until August 2, 1976, in which to file its response, and counsel for the defendants shall have until August 13, 1976, in which to file any desired reply, filed. CAM (cc: USA & counsels) dwp

August 2 Re SPEIGEL, HOLLOWAY & PERKINS: Government's Motion for extension of time for the filing of its response to deft. Spiegel's Motion for Judgment of Acquittal and/or Arrest of Judgment; and defendants Holloway and Perkins' Amended Motion for New Trial up to and including 8-27-76, and ORDER, dated 8-2-76, counsel for the U.S. to have until August 27, 1976, in which to file its response, and counsel for the defendants shall have until September 10, 1976, in which to file any desired reply. CAM (cc: USA & counsels) clh

Aug. 31 RE: SPEIGEL, HOLLOWAY & PERKINS: Government's Motion for extension of time, up to and including September 3, 1976, for filing response to defendant Spiegel's Motion for New Trial and Motion for Judgment of Acquittal and/or arrest of judgment; and defendants Holloway & Perkins' Amended Motion for New Trial, and ORDER dated 8/31/76, directing that the US Attorney have until 9/3/76 to file his response, and counsel for the defts. shall have until 9/17/76, in which to file any desired reply, filed, CAM (cc: USA & counsel) dwp

Sept. 7 Re SPEIGEL: Government's response in opposition to Deft. Speigel's motion for judgment of acquittal and/or arrest of judgment w/memorandum in opposition to deft.'s motion filed. (w/1 vol. attachments)

Re SPIEGEL, HOLLOWAY, & PERKINS: Government's response in opposition to Defts'. motion for new trial and amended motion for new trial, with memorandum of argument & authority in opposition and 1 vol. attachments, filed. clh

Sept. 9 Motion for new trial and briefs to CAM. clh

Sept. 10 RE: SPIEGEL, HOLLOWAY & PERKINS: ORDER, dated 9/9/76, directing that counsel for the defendants shall have until September 21, 1976, to file replies, if desired, to the government's response to all pending post trial motions, filed on September 7, 1976, filed. CAM (cc: USA & counsel) dwp

Sept. 14 Re SPIEGEL; ORDER, dated 9/13/76, extending time for deft. to file a Reply Brief to and including the 27th day of September, 1976, filed. CAM. (cc: to USA and counsel). jsr

Sept. 27 Deft's. reply brief to govt's. response to deft's. motion for judgment of acquittal and/or arrest of judgment.

Deft's. reply brief to govt's. response to deft's motion for new trial, filed.

Sept. 28 SUBMITTED TO JUDGE MOYE ON SPIEGEL'S MOTION FOR JUDGMENT OF ACQUITTAL AND/OR ARREST OF JUDGMENT AND MOTION FOR NEW TRIAL AND DEFTS' HOLLOWAY PERKINS & SPEIGEL MOTION FOR NEW TRIAL.

19 DATE 76	PROCEEDINGS
Sept. 28	Re SPIEGEL: Motion to strike affidavit of F. Carter Tate from govt's. response to deft's. memorandum of law in support of motion for new trial w/memorandum of law in support, filed. clh
Sept. 29	SUBMITTED TO JUDGE MOYE ON SPIEGEL'S MOTION TO STRIKE. clh
Oct. 7	Court reporter's steno notes of the proceedings, dated 8-8-76 & 8-9-76, filed. clh
Oct. 12	Govt's response to motion to strike, filed. (Orig. to CAM) clh
Oct. 13	ORDER setting oral arguments of evidentiary matters or other matters relevant to Court's consideration of motions for hearing 12-20-76 at 1:30 P.M. filed. (Order dated 10-8-76 rec'd 10-13-76 and copies served USA, counsels for each deft.) vtb
Oct. 19	Letter, dated 10-12-76, from Mark Kadish to Judge Moye requesting that the Court strike the Tate Affidavit and all references to it in govt. responses, filed.
Dec. 20	RE: HOLLOWAY, PERKINS & SPEIGEL: CAME ON FOR HEARING ON DEFENDANTS' MOTIONS FOR NEW TRIAL BEFORE JUDGE MOYE: The Court heard from counsel. CONT'D until 12/21/76 at 3:00 p.m. dwp
Dec. 21	HEARING ON MOTIONS FOR NEW TRIAL CONT'D: After discussions, it was determined that a further hearing would be set. vtb
1977	
Jan. 31	Evidentiary hearing reset from 2/7/77 to 2/22/77. Counsel notified. njn

19 DATE 77	PROCEEDINGS
Feb. 4	Court Reporters Steno notes of 12/20/76; 12/21/76, (Smith) filed. ch
[14] Feb. 22	RE: SPIEGEL, HOLLOWAY, & PERKINS: CAME ON FOR HEARING ON DEFENDANTS' MOTIONS FOR NEW TRIAL BEFORE JUDGE MOYE: Exhibits admitted. Defts' counsel moved to strike the testimony of F. Carter Tate, The Court DENIED the motion. CONT'D. dwp
Feb. 23	RE: SPIEGEL, HOLLOWAY, & PERKINS: HEARING CONTINUED: Evidence continued. The Court directed the parties to file briefs by 3/11/77, if they so desire. CONT'D. dwp
Feb. 24	RE: SPIEGEL, HOLLOWAY, & PERKINS: HEARING CONTINUED: Evidence admitted. The Court retained the file and exhibits. Case recessed. dwp
March 11	Re: HOLLOWAY & PERKINS: Supplemental brief in support of motion for new trial, filed. (to CAM). jsr
	Re: SPIEGEL, HOLLOWAY & PERKINS: Government's Supplemental Brief Regarding the Defendants' Waiver of a Jury of Twelve, filed. (to CAM on 3/14.)
	Re: SPIEGEL, HOLLOWAY & PERKINS: Government's Proposed Finding of Fact, filed. (to CAM on 3/14.) jsr
Mar. 24	Court Reporter's Steno Notes of the proceedings of 2-22-77 (Smith) (Motion For New Trial), filed. bmm
Apr. 14	RE SPIEGEL, A. HOLLOWAY, & PERKINS: ORDER dated 4-13-77, GRANTING new trial and stating that case will be tried Tues., 5-24-77, at 10:00 a.m., filed. CAM cc: USM, prob., defts, counsels, PSA aea

19 DATE 77	PROCEEDINGS
April 20	Re: SPIEGEL, HOLLOWAY & PERKINS: Government's Motion for Reconsideration (of Order dated 4/13/77), filed.
April 21	Re: SPIEGEL, HOLLOWAY & PERKINS: Government's Motion for Reconsideration to CAM w/order dated 4/13/77. jsr
May 9	RE SPIEGEL, A. HOLLOWAY, & PERKINS: Govt's motion to continue trial set for 5-24-77, filed. SUBMITTED TO JUDGE MOYE aea
May 20	RE SPIEGEL: Response to Govt's Motion for Reconsideration, filed. Response to Motion to Continue Trial, filed. Motion to Dismiss Motion for Reconsideration, filed. (origs. of all the above to Judge Moye) aea
May 26	RE SPIEGEL, HOLLOWAY, PERKINS: Brief in Support of Motion for Reconsideration, filed. (orig to Judge Moye) aea
June 3	Govt's Response Opposing Deft Spiegel's Motion to Dismiss the Motion for Reconsideration, filed. Govt's Motion for Hearing with brief in support, filed. aea (origs. to Judge Moye)
June 6	RE SPIEGEL: Motion for Extension of Time for filing response to Govt's Brief in Support of Motion for Reconsideration and ORDER extending same until 6-7-77, filed. cc: USA, counsel aea

APPENDIX J

[1432] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES	:	
	:	
v.	:	CRIMINAL ACTION
	:	
STANLEY SPIEGEL, et al.	:	NO. 27972

FILED: June 9, 1977

ORDER GRANTING RECONSIDERATION

The government's motion seeking reconsideration of this Court's order of April 14, 1977, granting a new trial is hereby granted, the order of April 14, 1977, is hereby vacated, and the Court will reconsider defendants' motion for new trial on the merits and its opinion and decision with respect thereto will be by subsequent order.

Any further matters which the parties desire to call to the attention of the Court prior to the issuance of said order will be considered at the hearing now scheduled for Friday, June 10, 1977, at 1:30 p.m.

This 8 day of June, 1977.

/s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX K

[1438] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES	)	
	)	CRIMINAL ACTION
v.	)	
	)	NO. 27972
STANLEY SPIEGEL, et al.	)	

FILED: October 27, 1977

ORDER OVERRULING MOTIONS FOR NEW TRIAL

On April 13, 1977, this Court granted defendants' motions for new trial "by reason only of the grounds relating to final decision by eleven jurors only." The Court further stated: "While there are substantial other issues raised, the Court would not grant a new trial on the basis of any one of them, but the Court must, of course, keep in mind that in the Court of Appeals, a ground for new trial, even though inadequate in itself, may have a tandem or enhancing effect. *U.S. v. Williams*, 523 F.2d 1203 (1975)."

As subsequently indicated to the parties, the Court's concern in this area was its "Mann" type charge given in this case in 1974. This Court's charge had subsequently been considered, in 1976, by the Court of Appeals in *U. S. v. Duke*, 527 F.2d 386 (1976), where the charge was criticized, but the conviction affirmed. However, in *U. S. v. Chiantese*, 546 F.2d 135 (January 28, 1977), the Court of Appeals so emphatically condemned the use of the Mann charge that it appeared to the Court that, despite the previous holding that this Court's use

of the Mann charge in the context of the other instructions with which it was given did not constitute reversible error, nevertheless, it possibly might have been so held in this case if considered in conjunction with the 12-juror issue.

Upon the government's motion, this Court granted reconsideration and has received further extensive written and oral argument. The Court was also informed of the decision of the Court of Appeals to reconsider *Chiatese* en banc, and this order has been delayed [1439] pending receipt of the en banc decision in that case which, so far as this Court can tell, has prospective effect only.

The Court is now persuaded that decision by an eleven man jury was not error, and that a 12-man jury was properly waived, in the absence in this circuit of any requirement that the waiver be by the party only (not his attorney) and in written form, since this is a waiver of a statutory - not constitutional - right. However, the Court is further persuaded that the defendants either knew actually the substance of their rights, or committed the entire decision without regard thereto to their attorneys. What was lacking here was the element of allocution apparently required in another circuit.

The only other matter as to which a finding may be desirable is that defendants' lack of access to the contents of the so-called "white" box, for a limited period of time did not substantially impair their defense in this case, which finding the Court hereby makes.

For the above reasons, defendants' motions for new trial are OVERRULED and DENIED.

SO ORDERED, this 26 day of October, 1977.

/s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

FILED IN CLERKS'S OFFICE
AND A TRUE COPY CERTIFIED, THIS
10-27-77
Ben H. Carter, Clerk

By: /s/ Delores W. Page
Deputy Clerk

APPENDIX L

[1442] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES	:	
	:	
v.	:	27,972
	:	
STANLEY SPIEGEL, et al.	:	

FILED: December 15, 1977

ORDER

Defendants' motion for judgment of acquittal is hereby OVERRULED and DENIED.

SO ORDERED, this 4 day of December, 1977.

/s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX M

[1443] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	
V.	:	CR. NO. 27,972A
	:	
STANLEY SPIEGEL, ET AL	:	

FILED: January 13, 1978

MOTION TO DISMISS INDICTMENT
FOR LACK OF SPEEDY RE-TRIAL

Now comes the Defendant, Stanley Spiegel, and moves this Court for an Order dismissing the indictment in the present case on grounds set forth in the Brief in Support of Motion to Dismiss attached hereto. The defendant further moves this Court for an Order allowing arguments on this Motion.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND

/s/ Mark J. Kadish
MARK J. KADISH

ATTORNEYS FOR DEFENDANT SPIEGEL

1012 Candler Building
Atlanta, Georgia 30303
Phone 577-2225

[1444] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA :
:
V. : CR. NO. 27,972A
:
STANLEY SPIEGEL, ET AL :

BRIEF IN SUPPORT OF MOTION TO DISMISS INDICTMENT

STATEMENT OF THE CASE

On April 14, 1977, this Court issued an Order vacating the original judgment of conviction in the case, granting Defendant Spiegel a new trial and requiring that he be retried within sixty days. A trial date of May 24, 1977 was set. On April 20, 1977, the Government filed a *Motion for Reconsideration* of the April 14 Order without a brief in support attached thereto. This Court, in accommodation to the Government, issued an oral Order which allowed the Government approximately seven days to file its brief in support of its Motion and to be in compliance with Local Rule 7. Although the Government never sought or received an extension of this Court's oral Order, it did not file its *Brief in Support of Motion for Reconsideration* until May 26, 1977. On June 8, 1977, this Court issued an Order which vacated its Order of April 14, and had the effect of reviving its original judgment in an attempt to avoid a speedy trial problem. See Exhibit "A" attached hereto. On October 27, 1977, this Court issued an Order denying Defendant Spiegel the new trial which it had previously granted to him by its original Order of April 14, 1977. On December 21, 1977 sentencing for the defendant was set for January 24, 1978. To the date of the filing of these pleadings, Defendant Spiegel has not been retried and no waiver of Defendant's

Speedy Retrial guarantees have been made.

ARGUMENT

This Court's Order of June 8, 1977, which vacated its prior Order of April 14, 1977, could not revive the original judgment of conviction of August 17, 1974. By the very nature of an Order [1445] granting a new trial, the judgments previously rendered becomes null and void. *Miller v. United States*, 224 F.2d 561 (5th Cir. 1955); *United States v. Spinella*, 506 F.2d 426, 430 (5th Cir. 1975); and *Sapir v. United States*, 348 U.S. 373, 99 L.Ed. 426 (1954). "The order granting the new trial necessarily has the effect of vacating the judgment of conviction rendered in the earlier trial." *United States v. Spinella, supra*, at 430. Since the judgment is null and void, a court does not have the power to reinstate the judgment. *United States v. Spinella, supra*. Also see Defendant Spiegel's *Brief in Support of Motion to Dismiss or in the Alternative, Motion to Vacate Orders* filed contemporaneously with the within and foregoing brief.

The time in which a defendant *shall* have after the granting of a new trial as provided by 18 U.S.C. §3161(e) is sixty days:

> ". . . except that the court retrying the case may extend the period for retrial *not to exceed* one hundred eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make the trial within sixty days impractical." 18 U.S.C. §3161(e) (Emphasis added).

There has been no finding by this Court which would necessitate extending the period of retrial for more than sixty days. However, the maximum period of one hundred and eighty days, which may not be exceeded by the very language of the statute has been exceeded.

The *Plan for the United States District Court*, Northern District of Georgia, for *Achieving Prompt Disposition of Criminal Cases* requires that where a new trial has been ordered by the District Court, it *shall* commence no later than ninety days from the Order granting a defendant a new trial. See Rule 7."

[1446] It is without question that both 18 U.S.C. §3161 (e) and this Court's rules concerning speedy retrial in criminal cases have not been complied with. Furthermore, Defendant Spiegel has not waived his rights set forth by the two aforementioned speedy trial guarantees. The language of 18 U.S.C. §3161(e) and of the Local Rule clearly shows that it was mandatory for Defendant Spiegel to have been retried within the time frames above-mentioned. This Court is given no discretion as to the last date by which the defendant should have been tried. Therefore, this Court should dismiss the instant indictment.

CONCLUSION

That this Court should issue an Order dismissing the present indictment for the failure to retry Defendant Spiegel within the time periods set forth in 18 U.S.C. §3161(e) and the speedy retrial rules of this Court.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

/s/ Edward T. M. Garland

EDWARD T. M. GARLAND

/s/ Mark J. Kadish

MARK J. KADISH

ATTORNEYS FOR DEFENDANT SPIEGEL

1012 Candler Building
Atlanta, Georgia 30303
Phone 577-2225

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA)
) CRIMINAL ACTION
VS.)
) NUMBER CR27,972
STANLEY SPIEGEL, et al.)

Transcript of proceedings had before The Honorable CHARLES A. MOYE, JR., U. S. District Judge, in Atlanta, Fulton County, Georgia, on June 10, 1977, commencing at 1:30 o'clock p.m., in the above-styled action.

APPEARANCES OF COUNSEL:

For the United States of America: WILLIAM P. GAFFNEY

For Defendant Spiegel: MARK J. KADISH

For Defendants Holloway and Perkins: J. ROGER THOMPSON

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EXCERPT

THE COURT: We'll take up the motions for new trial. Let me ask something that may save us some time. I have attempted by my last order, which I assume you have gotten, simply to maintain the status quo on the motions for new trial and to, I hope, obviate a speedy trial problem. That was the purpose of that order, not to indicate any leaning one way or another.

Now, there are apparently three, two or three areas where counsel will want to argue or be concerned. One (illegible) Mann Charge? Is that the name of it?

MR. KADISH: Mann, as Judge Brown calls it.

THE COURT: The Mann Charge. Now, Mr. Kadish says the thing was argued Tuesday en banc.

MR. KADISH: I don't know if it was argued.

MR. GAFFNEY: It was not argued, Your Honor. It was on briefs, reconsidered on briefs. Apparently the en banc Fifth Circuit met with regard to –

THE COURT: You mean to arrive at its decision?

MR. GAFFNEY: Yes, sir. That's pending.

THE COURT: That is pending and should be not too far in the future.

MR. GAFFNEY: As of today, as far as we can tell, there has been no written opinion.

THE COURT: I wouldn't expect it. I mean I

* * *

[1447] **CERTIFICATE OF SERVICE**

I hereby certify that I have this date personally, by hand, served a copy of the within and foregoing Motion to Dismiss Indictment for Lack of Speedy Re-Trial and Brief in Support thereof, upon Mr. William Gaffney, Assistant United States Attorney.

This the 13th day of January, 1978.

/s/ Mark J. Kadish

MARK J. KADISH

APPENDIX M-1

**[1448] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES OF AMERICA	:	
	:	
V.	:	**CR. NO. 27,972A**
	:	
STANLEY SPIEGEL, ET AL	:	

FILED: January 13, 1978

MOTION TO DISMISS INDICTMENT, ALTERNATIVELY MOTION TO VACATE ORDERS, AND MOTION TO BAR SENTENCING, OR ALTERNATIVELY MOTION TO STAY SENTENCING

Now comes the Defendant, Stanely Spiegel, and moves this Court for an Order dismissing the indictment, or alternatively vacating its previous Orders dated June 9, 1977, October 27, 1977 and December 21, 1977, and an Order barring the sentencing of Defendant Spiegel, or in the alternative an Order staying the sentencing date now set for January 24, 1978, on graounds set forth in the Brief in Support of this Motion attached hereto. The Defendant further moves this Court for an Order allowing oral argument on this Motion.

WHEREFORE, Defendant Spiegel prays that this Court issue Orders as follows:

1. An Order dismissing the instant case, or in the alternative an Order vacating its Orders dated June 9, 1977, October 27, 1977 and December 21, 1977;

2. An order barring the sentencing of Defendant Spiegel, or in the alternative an Order suspending the sentencing of Defendant Spiegel now set for January 24, 1978.

Respectfully submitted,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND

/s/ Mark J. Kadish
MARK J. KADISH

ATTORNEYS FOR DEFENDANT SPIEGEL

1012 Candler Building
Atlanta, Georgia 30303
Phone 577-2225

[1449] IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)
)
v.) CRIMINAL NO. 27,972A
)
STANLEY SPIEGEL)

BRIEF IN SUPPORT OF MOTION TO DISMISS INDICTMENT, ALTERNATIVELY, MOTION TO VACATE ORDERS, AND MOTION TO BAR SENTENCING, OR ALTERNATIVELY MOTION TO STAY SENTENCING

STATEMENT OF THE CASE

On August 17, 1974, a jury verdict was returned in the above-styled case which found the defendant Stanley Spiegel guilty of 32 counts of the indictment presented. Within the time allowed by law, defendant's counsel filed a Motion for a New Trial. On April 14, 1977, this Court issued an Order granting the defendant Spiegel and the other defendants a new trial. The government filed a Motion for Reconsideration of this Court's Order for a new trial on April 20, 1977, and on June 9, 1977, an order was issued granting the government's Motion for Reconsideration and vacating the April 14, 1977 Order. On October 27, 1977, this Court issued an Order overruling denying defendant's Motion for a New Trial. Sentencing for the defendant Spiegel was set for January 24, 1978 by Order dated December 21, 1977.

It is defendant Spiegel's position that this Court was without the authority and jurisdiction to grant the government's Motion for Reconsideration and to vacate its Order granting defendant a new trial and to reinstate the original judgment.

Argument

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court within a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand [1450] of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. Rule 33, F. R. Crim. P.

A court's jurisdiction and authority to grant or deny a new trial to a defendant is set forth in Rule 33 of the Federal Rules of Criminal Procedure, as amended February 25, 1966, effective July 1, 1966. The rule gives to a defendant *only*, the right to seek a new trial. *U.S. v. Eaton*, 501 Fed. 77 (5th Cir. 1974). If a Motion for a new trial is denied defendant has a right to appeal this denial pursuant to Rule 3 and/or Rule 4, Federal Rules of Appellate Procedure. The government conversely has no right to appeal an Order granting a new trial, as its appellate rights are restricted by status. See 18, U.S.C. §3731.

In the instant case, after defendants' Motion for New Trial was properly before this Court, it issued an Order granting defendant a new trial. This Court, however, 55 days later, issued a new Order for a new trial and vacated its Order of April 14. Your Honor intended that Order to reinstate the original judgment of conviction to avoid a speedy trial problem. See Transcript of the hearing held on June 10, 1977. (Tr. 2.) attached hereto as Exhibit "A". In granting the government's motion and in vacating its Order granting a new trial this Court committed error.

The order which granted the government's motion for reconsideration had the effect of granting to the government an appellate right which 18 U.S.C. 3731 does not allow. While there is no rule which gives either party a right to a Motion for Reconsideration, the law has allowed the same in the interests of saving appellate judicial time and in order that the issues in question may be more clearly drawn and set forth. See *U.S.* [1451] *v. Dieter*, U.S., 97 S.Ct. 18, 50 Led. 2d 8, 11 (1976). In the instant case neither of the reasons for allowing Motion for Reconsideration are present since the law has given the government no method or right to have appealed the original Order which granted defendant a new trial. See 18 U.S.C. 3731. This Court therefore lacked the authority and jurisdiction to have granted the government's motion.

Further, the government's Motion for Reconsideration, was never properly before this Court. The government's Motion was filed on April 20, 1977 without a brief in support of the Motion attached. Rule 90 of the local rules of this Court requires that,

> "Every motion, in both civil and criminal proceedings, when filed *shall be accompanied* by a memorandum of law citing supporting authorities . . . The clerk shall not accept for filing any motion which is not in conformance with this rule." (emphasis added).

This Court after objection by defense counsel, as an accomodation to the government, gave, approximately, an additional seven days in which the government could file its Brief in support of its motion. The defendant objected as government failed to file its brief as required by Your Honor. See Exhibit "B". The government did not file its brief until May 26, 1977. No extension of this oral order requiring the filing of a brief was sought by the government or was granted by this Court. The government, therefore, was in violation of both the local rules and the oral Order of this Court and its *Motion for Reconsideration* should not have been considered and its Motion and Brief in support thereof struck.

Therefore, the Court erred in considering and hearing the government's *Motion for Reconsideration.*

This Court also erred in vacating its order for a new [1452] trial. By the very nature of an Order granting a new trial, the judgment previously rendered becomes null and void. *Miller v. U.S.*, 224 F.2d 561 (5th Cir. 1955); *U.S. v. Spinella*, 506 F.2d 426, 430 (5th Cir. 1975); and *Sapir v. U.S.A.*, 348 U.S. 373, 99 L.ed 426 (1954). Since the judgment is null and void, a court does not have the power to reinstate it. *U.S. v. Spinella*, supra.

The facts of the case of *U.S. v. Spinella* can be compared closely to the facts of the instant case. In *Spinella* the district court judge ordered a new trial based upon the representation of defendant's counsel that additional testimony would exculpate the defendant. At the second trial, however, the defense rested without calling the witness upon whose testimony the Order for a new trial was based. The trial judge, at that point, aborted the second trial and reinstated the original judgment and sentence.

On appeal by *Spinella*, Judge Wisdom, along with Judge Bell and Brewster found that the trial judge had no authority to reinstate the original judgment as it had become null and void by the very nature of the Order granting a new trial. "The order granting the new trial necessarily has the effect of vacating the judgment of conviction rendered in the earlier trial". at 430. There is additional language concerning the questions in the instant case at it concerned a question not present in this case, *i.e.*, whether or not Spinella could be tried a third time.

The facts in the instant case are that the Court ordered a new trial and then vacated that Order which reinstated the original judgment. This action is clearly prohibited by the holding and reasoning in Spinella and the cases cited in support [1453] thereof.

The court therefore erred in reinstating the original judgment in this case.

As the original judgment became null and void when defendant's Motion for New Trial was granted, this Court lacks the power and authority to sentence defendant Speigel pursuant to that judgment. Therefore, its Order setting sentencing should be vacated and an Order issued barring the sentencing of the defendant Spiegel or in the alternative an Order staying the sentence hearing scheduled for January 24, 1978.

CONCLUSION

This Court had no authority or jurisdiction to grant the government's *Motion for Reconsideration* as this motion was never properly brought before this Court and that the granting of said motion in effect gave the government an appellate right which is not granted to the government in 18 U.S.C. §3731. Therefore, the Orders of this Court dated June 9, 1977, October 27, 1977 and December 21, 1977 should be vacated or alternatively this Court should issue an Order dismissing the indictment in the present case.

This Court had no authority to reinstate a previous judgment of conviction that had become null and void due to the Court's earlier Order granting defendant Spiegel a new trial. Since the original judgment of conviction became null and void, this Court lacks the power and authority necessary to sentence the defendant Spiegel pursuant to that judgment of conviction. Therefore, this Court should issue an Order barring the sentencing of defendant Spiegel or in the alternative issue an Order suspending the sentencing of defendant Spiegel now set for January 24, 1978, so that the Court may study these Motions.

/s/ Edward T. M. Garland

Edward T. M. Garland

/s/ Mark J. Kadish

Mark J. Kadish

1012 Candler Building
Atlanta, Georgia 30303
404/577-2225

EXHIBIT "A"

[1454] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
VS.	)	
	)	NUMBER CR27,972
STANLEY SPIEGEL, et al.	)	

Transcript of proceedings had before The Honorable CHARLES A. MOYE, JR., U. S. District Judge, In Atlanta, Fulton County, Georgia, on June 10, 1977, commencing at 1:30 o'clock p.m., in the above-styled action.

APPEARANCES OF COUNSEL:

For the United States of America:	WILLIAM P. GAFFNEY
For Defendant Spiegel:	MARK J. KADISH
For Defendants Holloway and Perkins:	J. ROGER THOMPSON

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EXCERPT

[1455] THE COURT: We'll take up the motions for new trial. Let me ask something that may save us some time. I have attempted by my last order, which I assume you have gotten, simply to maintain the status quo on the motions for new trial and to, I hope, obviate a speedy trial problem. That was the purpose of that order, not to indicate any leaning one way or another.

Now, there are apparently three, two or three areas where counsel will want to argue or be concerned. One is, what is it, the Mann Charge? Is that the name of it?

MR. KADISH: Mann, as Judge Brown calls it.

THE COURT: The Mann Charge. Now, Mr. Kadish says the thing was argued Tuesday en banc.

MR. KADISH: I don't know if it was argued.

MR. GAFFNEY: It was not argued, Your Honor. It was on briefs, reconsidered on briefs. Apparently the en banc Fifth Circuit met with regard to –

THE COURT: You mean to arrive at its decision?

MR. GAFFNEY: Yes, sir. That's pending.

THE COURT: That is pending and should be not too far in the future.

MR. GAFFNEY: As of today, as far as we can tell, there has been no written opinion.

THE COURT: I wouldn't expect it. I mean I

* * *

[1456] CERTIFICATE OF SERVICE

I hereby certify that I have this date personally, by hand, served a copy of the within and foregoing Motion to Dismiss Indictment, Alternatively, Motion to Vacate Orders, and Motion to Bar Sentencing, or Alternatively, Motion to Stay Sentencing, and Brief in Support thereof, upon Mr. William Gaffney, Assistant United States Attorney.

This the 13th day of January, 1978.

/s/ Mark J. Kadish
MARK J. KADISH

APPENDIX N

[1462] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES	)	
	)	
v.	)	CRIMINAL ACTION
	)	NO. 27972
STANLEY SPIEGEL, ET AL.	)	

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS INDICTMENT, OR, ALTERNATIVELY, TO VACATE ORDER

The United States of America, by and through its attorneys William L. Harper, United States Attorney for the Northern District of Georgia, and William P. Gaffney, Assistant United States Attorney, opposes the motions to dismiss the indictment, or alternatively to vacate certain orders, filed by defendant Spiegel and adopted by defendants Holloway and Perkins. In support of its position, the Government states as follows:

1.

The government's motion to reconsider the April 14, 1977 order granting defendants a new trial was properly filed, considered and ruled on by the court.

2.

A timely petition for reconsideration suspends the finality of an order for purposes of the Speedy Trial Act, 18 U.S.C. §3161, et seq., as well as for purposes of appeal.

3.

The government's right to petition for reconsideration in the district court is entirely distinct from its right to appeal under 18 U.S.C. §3731.

4.

The defendants' contention that the government's motion for reconsideration was untimely and subject to dismissal was previously raised and rejected prior to the Order of June 8, 1977 vacating the Order for new trial.

[1463] Wherefore, for the above-stated reasons, the government asks that the defendants' motions be denied and that judgment be entered on the verdicts of guilty and sentences be rendered.

Respectfully submitted,

WILLIAM L. HARPER
United States Attorney

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the party (parties) in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery.

This 30 day of January 1977

/s/ William P. Gaffney

Assistant United States Attorney

Attorney for

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES	)	
	)	CRIMINAL ACTION
v.	)	NO. 27972
	)	
STANLEY SPIEGEL, ET AL.	)	

BRIEF IN SUPPORT OF GOVERNMENT'S RESPONSE

The government's motion to reconsider is properly characterized not as an appeal but as a motion for rehearing. The Supreme Court has stated that such motions made by the government are proper in criminal cases. *U.S. v. Healy*, 376 U.S. 75 (1964); *Forman v. U.S.*, 361 U.S. 416 (1960). The Court in *Healy* noting that these types of motions are not provided by statutes or rules stated they are recognized as a traditional and virtually unquestioned practice. *Healy*, p. 79. The Court further stated that the principle of strict construction of statutes permitting government appeals in criminal cases should not be utilized to undermine a well-established procedural rule for criminal litigation.

This court in granting the motion for reconsideration has previously ruled on the question of the timeliness of the filing of the government brief in support of the motion for reconsideration. This issue was raised by the defendant in three different pleadings before the order of the court of June 3, 1977, granting the motion for reconsideration. This is a matter in the court's discretion. Proper consideration of the schedule of counsel for both sides, the illness of one of the defense counsel, the extensive nature of the legal issues involved in the government's brief, are all factors that supported the court's decision to reject the assertions of untimeliness and consider

the merits of the arguments for reconsideration. A complete account of the time from the initial grant of a new trial until the filing of the government's brief in support of reconsideration was filed on June 3, 1977, and is attached hereto as Exhibit A.

[1465] A motion for rehearing suspends the finality of the court's earlier judgment pending the further determination whether or not the judgment should be modified. *Dept. of Banking v. Pink*, 317 U.S. 264 (1942). This principle was recently reiterated in *U.S. v. Dieter*, 429 U.S. 6 (1976), where the court stated citing *Healy* that "the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending."

The defendant urges that the court rule that the new trial ordered wiped out all previous proceedings based on *U.S. v. Spinella*, 506 F.2d 426 (5th Cir. 1975). The situation in *Spinella* is completely inapposite to this case and it should not be applied. No petition for rehearing was filed after a new trial was ordered. The trial judge in *Spinella* vacated his new trial order *sua sponte* after the completion of the defendant's case in the second trial. Here, a motion for reconsideration was filed within six days of the order granting a new trial. The timely filing of this motion suspended the finality of the earlier order which was subsequently vacated by the granting of reconsideration on June 8, 1977.

Under the facts in this case a reconsideration was clearly appropriate. According to comments made by the court on June 10, 1977, the decision to grant a new trial was made in large part with the understanding that the panel decision in *United States v. Chiantese*, 546 F.2d 135 (5th Cir. 1977) controlled. However, a rehearing en banc was granted in that case and the matter was taken under en banc consideration on

briefs on June 8, 1977. The en banc decision announced in October, 1977, completely removed the trial court's earlier fears and the motions for new trial were denied on October 27, 1977.

Again it should be pointed out that defendant raised this argument in pleadings prior to the order granting the motion for [1466] reconsideration and vacating the order for new trial. Defendant should realize that the adverse ruling to them at that time indicates that these arguments are not valid and will not be accepted by the court. This present set of motions by the defendant is simply an attempt to erase the prior resolution of all legal and factual issues present in the case. A ten week trial, exhaustive briefs and memoranda, and oral hearings have brought about a result which defendant seeks to obviate by rehashing previously rejected arguments.

Three and one-half years having passed since the jury rendered its verdict, the time has come to impose sentence without further delay. The court should again reject these arguments, deny the motions, enter judgment on the verdicts, and allow the defendants to raise their arguments in the Fifth Circuit Court of Appeals.

Respectfully submitted,

WILLIAM L. HARPER
United States Attorney

/s/ William P. Gaffney
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the party (parties) in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery.

This 30 day of January 1977
/s/ William P. Gaffney
Assistant United States Attorney
Attorney for

EXHIBIT A

[1467] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL INDICTMENT**
v.	:	
	:	**NO. 27,972**
STANLEY SPIEGEL, et al.	:	

Filed June 3, 1977

GOVERNMENT'S RESPONSE OPPOSING DEFENDANT SPIEGEL'S MOTION TO DISMISS THE MOTION FOR RECONSIDERATION

The United States of America by its undersigned attorneys, John W. Stokes, Jr., United States Attorney, Northern District of Georgia, and William P. Gaffney, Assistant United States Attorney, filed this response opposing defendant Spiegel's motion to dismiss the government's motion for reconsideration, and in support of its position shows the following:

1.

Defendants Stanley Spiegel, Allan M. Holloway, and Allen E. Perkins were convicted on August 17, 1974, on federal mail fraud charges for using the United States mails in furtherence of a scheme to defraud and to obtain money, in violation of 18 U.S.C. §1341.

2.

Defendants Spiegel, Holloway, and Perkins filed motions for new trial on August 23, 1974, alleging that the verdict was contrary to the evidence and without evidence to support it; that the verdict was against the weight of the evidence; and that the verdict was contrary to law and principles of justice and equity.

[1468] 3.

Movants Holloway and Perkins also sought on August 23 an extension of time for a period of 30 days following either completion of the trial transcript, or the conclusion of any evidentiary hearings conducted on defendant Spiegel's motions to dismiss, in which to file an amended motion for new trial.

4.

Movant Spiegel filed a motion on August 23 to enlarge the time for filing an amended motion for a new trial and a motion for judgment of acquittal, until 60 days after the completion of the trial transcript.

5.

The court on August 26 granted movant Spiegal until December 15, 1974, in which to file an amended motion for new trial and a motion for judgment of acquittal.

6.

The court granted movants Holloway and Perkins motion for an extension of time in which to file an amended motion for a new trial on September 24, 1974.

7.

On March 24, 1976, the court ordered that movant Spiegel's motion for new trial and memorandum in support thereof was to be filed within 45 days, that is by May 8, 1976.

8.

On May 11, 1976, counsel for Holloway and Perkins met with Judge Moye in chambers and obtained a thirty day extension from that date within which all defendants' amended motions for new trial were to be filed.

[1469] 9.

On May 24, 1976, the court ordered that the movants' post-trial motions be filed no later than June 11, 1976.

10.

Movants Holloway and Perkins filed an amended motion for new trial on June 11; movant Spiegel filed a motion for judgment of acquittal pursuant to rule 29(c) and a rule 33 motion for new trial on June 11.

11.

The government's response to the post-trial motions, the consent of counsel having been obtained, was filed on September 7. The movants were ordered to reply, if desired, by September 21.

12.

By court order, movant Spiegel was allowed to file his reply on September 27.

13.

An evidentiary hearing was held from February 22 through 24, 1977, on issues raised in the post-trial motions.

14.

On April 14, 1977, an order granting a new trial was filed, the sole grounds for which was the verdict by eleven jurors.

15.

On April 15, Attorney Garland, while at a seminar held at the Hyatt Regency Hotel, Atlanta, Georgia, stated to government counsel that due to conflicting trial settings counsel for Spiegel would not insist on an immediate retrial. [1470] Reference was made to several long cases then pending before this court involving clients of Mr. Garland. Attached as Exhibit A is a copy of a letter dated March 24 to Judge Henderson from attorneys Garland and Kadish.

16.

On April 20, 1977, the government filed a motion for reconsideration asking the court to vacate the order granting new trial and schedule oral argument. The government was granted leave of court to file a brief in support of its motion.

17.

Subsequent to the filing of this motion, Attorney Kadish in a telephone conversation with government counsel stated that he did not wish to proceed with a retrial as early as May 24; further, Attorney Kadish stated that the government could have as much time as necessary in filing its brief in support of the motion for reconsideration.

18.

On April 26, 1977, government counsel conferred with Attorneys Garland and Kadish in the United States Courthouse, Room 318, and was informed that movant Spiegel would contend that a retrial is barred by the double jeopardy clause. Attorney Kadish expressed concern that the time for filing pre-trial motions ought to be tolled during the period in which reconsideration was pending; he again stated his desire that the retrial not commence on May 24. Attorney Kadish suggested that government counsel advise the court [1471] that counsel were in agreement regarding the tolling of his time for filing pre-trial motions and that an order removing the case from the calendar of May 24 would be necessary.

19.

Government counsel thereafter met with Judge Moye in chambers relaying Attorney Kadish's concern. The jeopardy problem was brought to the court's attention as well as the procedural steps required in the event an appeal would be necessary. Judge Moye stated that if an appeal were pending that no retrial would be possible and that the procedural steps involved made in unlikely that a retrial could commence by May 24. The court stated it would consider a motion removing the case from the calendar.

20.

On or about May 5, Attorney Kadish telephone government counsel indicating a significant change in his position after discussions with movant Spiegel. All prior statements of counsel notwithstanding, movant Spiegel's position was then stated to be that the 60 day period for retrial had to be computed from April 13, regardless of the pending reconsideration.

21.

On May 6, 1977, all counsel met with Judge Moye in chambers regarding the government's motion to continue trial from the May 24 calendar. At this meeting counsel for Spiegel outlined his position on the jeopardy issue. The court informed counsel that a full reconsideration of the order granting new trial would be forthcoming after the briefs were received. The court set May 10 for the government's brief, May 13 for the movants' briefs, and stated that the court's ruling would be made by May 18.

[1472] 22.

On the evening of May 6, government counsel was notified that Attorney Kadish had been hospitalized and had been placed under bed-rest for at least a one-week period.

23.

Counsel for movants Holloway and Perkins commenced a two week trial on May 9 in a criminal matter involving State Senator E. Culver Kidd.

24.

Government counsel was informed that Judge Moye was to be in Washington D.C. for the entire week commencing May 16.

25.

Government counsel is presently responsible for a criminal case involving fraud charges against attorney and former State Senator Maylon K. London, which is scheduled for trial in the Gainesville Division for the term commencing June 6. A related trial in 1975 lasted two weeks.

26.

In view of paragraphs 22 through 25, government counsel met in chambers with Judge Moye on or about May 9 and informed the court of the foregoing facts. The court expressed the view that a new briefing schedule would depend upon all counsels' availability. The government understood that it was not obligated to file its brief on May 10 in view of the changed circumstances affecting all counsel and the court.

27.

Attorney Garland was notified by telephone that the government would not be filing its brief on May 10, and he expressed no opposition at that time inasmuch as Attorney Kadish would be unavailable for the balance of that week.

[1473] 28.

On May 23, government counsel informed Judge Moye in chambers that a handwritten draft of the brief had been submitted for typing but due to other work in progress and the length of the draft, it could not be completed until later in the week. The court expressed no disapproval and sated that the movants would be given additional time in which to respond.

29.

The government filed its brief on May 26, 1977.

WHEREFORE, having fully responded, the government requests that the motion to dismiss be summarily denied.

Respectfully submitted,

JOHN W. STOKES, JR.
UNITED STATES ATTORNEY

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery.

This 3 day of June 1977

/s/ William P. Gaffney
Assistant United States Attorney
Attorney for United States

[1474] STATE OF GEORGIA)
COUNTY OF FULTON)

Before me, an officer duly authorized by law to administer oaths, personally appeared William P. Gaffney, who being first duly sworn, deposes and upon oath states that the facts set forth in the foregoing Response are true and correct to the best of his knowledge, information and belief.

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

Sworn to and Subscribed
Before me this Day of
3rd June 1977.

/s/ Barbara S. Finsher
NOTARY PUBLIC

EXHIBIT A

[1475]

LAW OFFICES
GARLAND, NUCKOLLS, KADISH, COOK
& WEISENSEE, P.C.
1012 CANDLER BUILDING
PEACHTREE STREET
ATLANTA, GEORGIA 30303
404/ 577-2225

March 24, 1977

Honorable Albert J. Henderson, Jr., Judge
United States District Court
Northern District of Georgia
Atlanta Division
United States Courthouse
Atlanta, Georgia

Dear Judge Henderson:

I am writing this letter to you as Chief Judge of this District Court on behalf of Ed Garland and myself. We hope to obtain the court's advice and consideration of calendar problems relating to the scheduling of trial dates by various Judges of this Honorable Court in certain "long cases" hereinafter enumerated. Although our law firm has endeavored to serve this Court in a diligent fashion and endeavored to only accept cases which we will be able to try without burdening the Court with requests for continuances, the individual calendar procedure now in effect has resulted in our inability to effectively discharge our responsibility to this Court and to our clients. Under the individual calendar system, it is not possible for us to ascertain, when we take representation of a particular case, when that case will be reported for trial by a particular Magistrate. It is even more difficult to predict when any one of the

Judges of this Court will issue an order setting the case down for his particular trial calendar.

I am sure that other members of the criminal defense bar have felt the trial pressures now confronting our law firm; however, it would appear that our firm has a greater involvement in the "long case" calendar of this Court and it is in this area that we believe that Your Honor should take some action to achieve a certain amount of judicial coordination and cooperation so that defense counsel involved in long cases can professionally serve this Court.

The situation confronting our law firm is as follows:

1. April 4, 1977 - *United States v. Paul Levine*, Cr. 76-184-A, scheduled for trial before Honorable Richard Freeman. This case is expected to last approximately two weeks. Counsel of record is Mark J. Kadish. This case was set for trial by Judge Freeman approximately three weeks ago. The Assistant United States Attorney is Glenna Stone. I was retained in this matter on June 15, 1976.

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2. April 18, 1977 - *United States v. Ernie Crothers, Horace Jones and Douglas Jones*, Cr. 76-380A and Cr. 76-381A. These cases are scheduled for trial before Honorable Newell Edenfield and are expected to take place seriatim and last approximately two weeks. Counsel of record are both Mark J. Kadish and Edward T. M. Garland, and Assistant United States Attorney Robert Boas. The cases were calendared by Judge Edenfield on March 18, 1977. We were retained in these cases in December, 1976.

3. April 20, 1977 - *United States v. Augustus Frank Adamson*, Cr. 77-63-A, scheduled for trial before Your Honor. This case is expected to last at least two weeks. Counsel of record will be Edward T. M. Garland, who was retained on March 14, 1977. This case was set by Your Honor on March 3, 1977. The Assistant United States Attorney in this matter is Gale McKenzie. It should be noted that the Adamson case was set down before Judge Edenfield set down the Ernie Crothers, Horace Jones, et al matter, and that we were retained prior to that date.

4. *United States v. Stanley Kreimer*, Cr. 76-26-A, before Honorable Charles A. Moye, Jr. Counsel of record is Edward T. M. Garland, and the Assistant United States Attorney is William Gaffney. The exact trial date of this case is not firm, but Judge Moye has indicated that it is likely it will be tried sometime between April 12, 1977 and May 30, 1977. Mr. Garland was retained in this case in January of 1976. The trial is expected to last from four to six weeks.

5. *United States v. Stanley Spiegel*, Cr. A-27972, A Motion for New trial in this case is pending before Honorable Charles A. Moye, Jr., who has ordered counsel of record, Edward T. M. Garland and Mark J. Kadish, to be available for a trial on May 30, 1977. Expected length of this case is six to ten weeks. Mr. Garland was retained by Mr. Spiegel in January of 1973. Mr. William Gaffney is the Assistant United States Attorney in this case.

6. June 6, 1977 - *United States v. James Black, et al*, Cr. 76-409A. This case was set for trial by Your Honor on January 7, 1977. Edward T. M. Garland is counsel of record for Mr. Harold Chancey, and Mr. Jerry Froelich is the Assistant United States Attorney. Mr. Garland was retained by Mr. Chancey in January, 1977. This case is expected to last from four to six weeks.

It is obvious that the trial schedule, from the standpoint of our law firm, is onerous. We are in the process of using all of our professional resources to properly prepare each of these cases for trial. Of course, this law firm also has other commitments at other State and Federal Courts throughout

Georgia and in some of our sister states. It would appear from the cases enumerated above that either Mr. Garland or I, particularly Mr. Garland, will be on trial in this Court from early April, 1977 through July, 1977, without any hiatus.

We would most respectfully ask Your Honor to arrange a meeting between Mr. Garland, Mr. Kadish and the various United States Attorneys to review the "long case" calendars with a view to adjusting the "long case" calendar to the extent that counsel for both sides will have some reasonable period of time between cases so that we can better serve this Court.

As I write this letter Mr. Garland is currently on trial in the matter of *State of Georgia v. Robert Llewelyn*, Indictment Numbers A-34160-1-2, before the Honorable Charles A. Weltner. This trial commenced on Tuesday, March 22, 1977, and is expected to last into next week. Thereafter, Mr. Garland is scheduled to try the murder case of *State of Georgia v. William Edward Alley*, pending in the Superior Court of Catoosa County, and this trial is expected to last approximately one week. Mr. Garland was retained in the Llewelyn case in February, 1977, and has been representing Mr. Alley since October, 1976. He recently completed the trial of *United States v. William Edward Alley* before the Honorable Richard Freeman in Rome, Georgia. Prior to that, Mr. Garland tried the case of *United*

States v. Donald James, et al, before the Honorable Charles A. Moye, Jr., which case last approximately two weeks. Mr. Kadish has tried the case of *United States v. John William Gibbs* before the Honorable Wilbur Owens in Macon, Georgia, which mistrial and retrial consumed approximately two weeks, concluding on January 20, 1977. Thereafter Mr. Kadish tried the case of *United States v. Capt. Ronald Smith* before the Honorable Kirby Smith at Keesler Air Force Base, Biloxi, Mississippi, which trial consumed approximately one week. Mr. Kadish has most recently appeared before Honorable Charles A. Moye, Jr. in an evidentiary hearing relating to a Motion for New Trial in the matter of *United States v. Stanley Spiegel, supra*, the hearings, preparation therefor and submissions of briefs consuming at least six working days. Most recently Mr. Kadish has been working on an appeal of a civil matter from this Court, styled *Dr. Joseph Gilbert v. Donald Johnson, et al*, Case No. 16424, which case involved a most complex record in excess of 5,000 pages, and has an appellant's brief deadline of April 11, 1977.

[1478] Honorable Albert J. Henderson, Jr.

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This letter is written reluctantly as we do not wish to burden Your Honor with additional administrative problems; however, we see no alternative but to seek the Chief Judge's counsel and advice on the matters herein set forth.

Very truly yours,

GARLAND, NUCKOLLS, KADISH, COOK & WEISENSEE, P.C.

/s/ Edward T. M. Garland
EDWARD T. M. GARLAND

/s/ Mark J. Kadish
MARK J. KADISH

MJK:sb

cc: Honorable Charles A. Moye, Jr., Judge
Honorable Newell Edenfield, Judge
Honorable Richard C. Freeman, Judge
Honorable John Stokes, U.S. Attorney
Mr. Bruce Kirwan, Federal Defender Program
Honorable Allen L. Chancey, Magistrate
Honorable Joel Feldman, Magistrate
Honorable Owen Forrester, Magistrate
Ms. Glenna Stone, Assistant U.S. Attorney
Mr. Robert Boas, Assistant U.S. Attorney
Ms. Gale McKenzie, Assistant U.S. Attorney
Mr. William Gaffney, Assistant U.S. Attorney
Mr. Jerry Froelich, Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA :
: CRIMINAL INDICTMENT
v. :
: NO. 27,972
STANLEY SPIEGEL, et al. :

Argument and Authority

Defendant Spiegel seeks a dismissal to prevent a decision on the merits of the government's motion for reconsideration. The facts, however, show that a timely motion for reconsideration has been filed suspending the finality of the Order Granting New Trial. The illness of Attorney Kadish, as well as the commitments of the remaining counsel and the court, prompted the revision of the briefing schedule fixed on May 6. The court retains discretion to modify an informal briefing schedule as circumstances dictate. No abuse of that discretion occurred in this instance. If the defense is placed at a disadvanate by the length of the government's brief, the remedy is to ask for a sufficient amount of time in which to fully respond.

In the event rigid time bars are to be applied, none of movants' post-trial motions filed June 11, 1976 were timely. Rules 29(c) and 33 require that the motions must be filed within 7 days of the verdict or within such further time as the court may fix *within the 7-day period.* Neither of the orders extending time were set within that period. The record shows that movant Spiegel's extension of time was granted nine days after verdict, effective through December 15, 1974. No order further extending the time beyond December 15, 1974, was filed, nor was such a motion on behalf of defendant Spiegel presented to the court prior to expiration of the

additional time granted. It is not clear that the court even possesses the power to further extend the time outside the original 7-day period under rules 29(c) and 33. Movants Holloway and Perkins initial motion for an extension was not granted until forty days after verdict, long after the court's power to extend time had lapsed.

The effect of this jurisdictional failure removes from the district court's consideration all grounds asserted for post-trial relief except those dealing with the sufficiency of the evidence filed on August 23, 1974 (see paragraph 2, Government's Response). Movant Spiegel's extension, if properly granted, expired on December 15, 1974; while movants Holloway and Perkins never received a lawful extension within the 7-day period after verdict. Thus, the sole grounds properly raised before this court are without merit. The remaining grounds asserted on June 11, 1976, must be addressed to the Fifth Circuit, as this court is without jurisdiction to entertain them. Rules 29(c) and 33, F.R.Crim.P.

Beyond the jurisdictional failure cited, the movants are not prejudiced by the additional time allowed the government in filing its brief in support of reconsideration. This is a matter clearly within the court's discretion, unlike the jurisdictional time requirements set forth in rules 29(c) and 33. No evidentiary hearing is necessary to dispose of this contention. It appears that movant Spiegel seeks to divert attention from the merits of the reconsideration issue and create a false issue regarding the prosecution's conduct and motives. Such an effort does not deserve to be dignified by a hearing.

A reading of the Brief in Support of the Motion for Reconsideration amply demonstrates that it is not a pleading filed in bad faith as a delaying tactic. The issues researched and briefed reach the heart of this case and the legal principles outlined compel a reversal of the pending order for new trial

The record does not need to be further burdened by a hearing collateral to the merits of the dispute.

A timely petition for reconsideration suspends the finality of an earlier order, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. *Department of Banking v. Pink*, 317 U.S. 264 (1942). In *United States v. Healy*, 376 U.S. 75 (1964) it was held that the government's 30-day period for filing notice of appeal runs from the denial of a timely filed petition for reconsideration rather than the date of the original judgment. Most recently in *United States v. Dieter*, ____ U.S. ____, 45 U.S.L.W. 3277 (Decided Oct. 12, 1976), the Supreme Court reaffirmed the principal that a timely petition for reconsideration renders the original judgment non-final for purposes of appeal for as long as the petition is pending.

These cases control here and the finality of the April 13 Order Granting New Trial has been suspended since April 20. While no decisions have passed specifically on the issue of finality with respect to the Speedy Trial Act, 18 U.S.C. §3161(e), it would be unthinkable to hold otherwise, unless the motion for reconsideration were filed in bad faith. The policy of allowing district courts the opportunity to promptly correct their own alleged errors would be defeated if the government could not petition for reconsideration, absent bad faith, without jeopardy of violating the Speedy Trial Act.

Movant Spiegel contends that if the court does not try him by June 12, that 18 U.S.C. §1361(e) compels that the indictment be dismissed. [1] The sixty-day period for retrial, however,

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1 Beyond this speedy trial claim, movant Spiegel through counsel has asserted that all retrial is barred on jeopardy grounds.

is now suspended as the motion for reconsideration is still pending. The action occasioning the retrial is not final unless and until the court denies reconsideration. By a separate pleading, the government has requested a hearing on its motion for reconsideration. No need exists to take up further questions regarding the timeliness of the government's brief: it presents a substantial legal attack on the propriety of the grant of a new trial. The government did receive an informal extension to file its brief, just as the defendants have received on several occasions set out in the Government's Response. If defendants have a legal rejoinder on the merits, it should be filed prior to the hearing requested by the government. No purpose can be served by procedural wrangling other than obfuscating the legal issues now focused for the court.

In conclusion, the government urges that the motion to dismiss the motion for reconsideration be denied without a hearing. In the alternative the government asks the court to deny the post-trial motions filed on June 11, 1976, as untimely, and overrule the motions for new trial filed on August 23, 1974.

Respectfully submitted,

JOHN W. STOKES, JR.
UNITED STATES ATTORNEY

/s/ William P. Gaffney
WILLIAM P. GAFFNEY
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a franked envelope requiring no postage for delivery.

This 3 day of June 1977

/s/ William P. Gaffney

Assistant United States Attorney

Attorney for United States

[1497]

APPENDIX O

[1497] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES	:	
	:	
v.	:	CRIMINAL ACTION
	:	NO. 27972A
STANLEY SPIEGEL, et al.	:	

FILED: February 1, 1978

ORDER

Defendant's motion to dismiss indictment, alternatively to vacate orders and to bar sentencing, and, alternatively to stay sentencing and to dismiss indictment for lack of speedy re-trial is OVERRULED and DENIED.

SO ORDERED, this 1 day of February, 1978.

/s/ Charles A. Moye, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX P

LOCAL RULES

of the

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF GEORGIA

EFFECTIVE January 1, 1974

[13]

[13] client of his intention to withdraw from the case, and shall specify the manner of such notice to the client, attaching copy of notice. Such notice to the client shall be given at least ten days prior to the request to the Court. Upon the filing of the request with the clerk, a copy thereof shall forthwith be mailed to the client and within ten days thereafter such request shall be presented by the clerk to the District Judge or Bankruptcy Judge for his action thereon. Ordinarily counsel will not be allowed to withdraw after pretrial, or in any event, if such withdrawal will delay the trial of the case, in which event, the attorney shall continue as responsible for the handling of the case.

71.8 Relations With A Jury. All attempts to curry favor with juries by fawning, flattery, or pretending solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors and propositions to dispense with argument or preemptory challenges, should be made to the Court out of the jury's hearing. Before and during the trial, a lawyer should avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not.

Rule 80

FILES AND EXHIBITS AND REMOVAL THEREOF BY COUNSEL

81.1 Removal Of Original Papers. Original papers in custody of the clerk shall not be removed by anyone except that magistrates, bankruptcy judges, fiduciaries of bankruptcy estates after having obtained the permission of the bankruptcy judge, official court reporters, special masters, or law clerks of the judges may remove original papers as may be necessary to expedite the business of the Court. Duplicate files of pleadings,

if available, may be removed by counsel upon the consent of the clerk.

81.2 Conditions Of Removal. When papers are removed, they will not be permitted to be taken from the jurisdiction of the Court.

81.3 Original Paper To Court Of Appeals. This rule is not to prohibit the forwarding of original records to the Court of Appeals in accordance with Rules 10 and 11, Federal Rules of Appellate Procedure. Also, upon order of the Court, the original records may be withdrawn by counsel for either party in ac- [14] cordance with Rule 11(c), Federal Rules of Appellate Procedure, for appeal purposes.

81.4 Exhibits. All exhibits received and offered into evidence at any hearing shall be delivered to the clerk, who shall keep them in custody unless otherwise ordered by the court; except that the clerk shall permit United States magistrates, bankruptcy judges and court reporters to have custody as may be necessary to expedite the business of the Court. It is the intent of this rule that exhibits shall not be removed from the office of the clerk except in extreme cases. All rejected exhibits (exhibits tendered but not admitted into evidence) will be retained by the clerk the same as exhibits that are admitted. Rejected exhibits shall be listed on the exhibit list but not stamped admitted. Exhibits that are withdrawn or not tendered will not be retained by the clerk but will be shown on the exhibit list as being withdrawn or not tendered.

81.5 Original Transcripts. The original transcript of testimony and any record of proceedings filed with the Clerk of this Court by an official court reporter or commissioner shall not be removed from the office of the clerk by the parties.

81.6 Return Of Exhibits. All models, diagrams, books, or other exhibits other than contraband received in evidence or marked for identification in action or proceeding shall be removed by the filing party within three months after final adjudication of the action or proceeding and disposition of the appeal, if one is filed, or expiration of the appeal period if no appeal is filed, and if not so removed such exhibits may be destroyed or otherwise disposed of as the clerk may deem proper, after ten days notice to counsel.

81.7 Closed Files. All closed files of the Court may be forwarded to the federal record center serving this district. Thereafter, persons desiring use of any such files may, upon good cause shown, on an appropriate form furnished by the clerk, request that such files be returned for examination in the clerk's office.

Rule 90

MOTIONS

91.1 Filing. Every motion, in both civil cases and criminal proceedings, when filed shall be accompanied by a memorandum of law citing supporting authorities and where allegations of fact [15] are relied upon, affidavits in support thereof. The clerk shall not accept for filing any motion which is not in conformance with this rule.

91.2 Reply. Each party opposing a motion shall serve and file a response, reply memorandum, affidavits or other responsive material not later than ten days after service of the motion, except that in cases of motion for summary judgment the time shall be twenty days after the service of the motion. Failure to file a response shall indicate that there is no opposition to the motion.

91.3 Hearings. All motions shall be decided by the Court without oral hearing unless otherwise ordered by the Court.

91.4 Motions Pending On Removal. When an action or proceeding is removed to this Court with pending motions on which briefs have not been submitted, the moving party shall file and serve a memorandum in support thereof within ten days after removal and each party opposing the motion shall then comply with Rule 91.2.

91.5 Motions In Criminal Cases. No motion shall be filed in any criminal case unless accompanied by a written statement of counsel certifying that counsel for the moving party, or the moving party if not represented by counsel, has conferred with opposing counsel or party, as the case may be, in an effort in good faith to resolve by agreement the subject matter of any motion, but has not been able to do so. In addition, the written statement shall specify the information that has been made available to opposing counsel or parties in lieu of filing of the motion, (In this connection counsel are referred to U.S. v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972)).

91.6 Failure To Make Discovery And Motion To Compel Discovery.

91.61 Motions to compel discovery in accordance with Rules 33, 34, 36 and 37 of the Federal Rules of Civil Procedure shall:

91.611 quote verbatim each interrogatory, request for admission, or request for production to which objection is taken;

91.612 include the specific objection;

[16] 91.63 include the grounds assigned for the objection (if not apparent from the objection); and

91.614 include the reasons assigned as supporting the motion, and shall be written in immediate succession to one another. Such objections and grounds shall be addressed to the specific interrogatory, request for admission, or request for production and may not be made generally.

91.62 Counsel for the moving party shall confer with counsel for the opposing party and file with the Court at the time of filing the motion, a statement certifying that he has conferred with counsel for the opposing party in a good faith effort to resolve by agreement the issues raised and that counsel have not been able to do so. If certain of the issues have been resolved by agreement, the statement shall specify the issues remaining unresolved.

91.7 Motions For Summary Judgment.

91.71 Motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure shall be in accordance with that rule except that the party opposing the motion shall have twenty days after service of the motion in which to serve responsive pleadings.

91.72 Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

91.8 Orders Made Orally In Court. Unless the Court directs otherwise, all orders including findings of fact and conclusions of law orally announced in court shall be prepared in writing by the attorney for the prevailing party and taken to the judge within two days thereafter, with sufficient copies for all parties and the Court.

91.9 Emergency Motions. This Court may upon written motion

[17] 91.9 Emergency Motions. This Court may upon written motion and good cause shown waive the time requirements of this rule and grant an immediate hearing on any matter requiring such expedited procedure. The motion shall set forth in detail the necessity for such expedited procedure.

92.0 Time For Filing Motions. Motions for summary judgment in a given case under Rule 56 of the Federal Rules and motions to dismiss under Rule 12 of the Federal Rules shall not, unless otherwise ordered by the Court, be entertained unless said motions are made, filed and served upon the opposing party within ten days after the mailing by the clerk of a pretrial notice of said case.

Rule 100

CONTINUANCES

101.1 Generally. A continuance of any trial, pretrial conference, or other hearing will be granted only on the basis of exceptional circumstances. No such continuances will be granted on stipulation of counsel alone.

101.2 Absence Of Witnesses. Motions for continuahce on account of the absence of any witness must show steps which have been taken to secure the attendance of the witness, the nature of his testimony, and when the witness will be available, and unless the same waived, must include a certificate of a doctor where illness is claimed. The stipulation of the adversary

as to the witness' testimony shall be sufficient reason for denial of the motion of continuance.

Rule 110

ADVANCE PAYMENTS OF FILING FEES

111.1 Clerk To Require. The clerk shall require advance payment of fees before any civil action, suit or proceeding is filed. A notice of appeal shall be filed when received. (Parissi v. Telechron, Inc., 349 U.S. 46; 28 U.S.C. § 1914).

111.2 When Fee Not Included. When pleadings are received for filing and the required filing fee is not included with the pleadings, the clerk shall note "received" thereon and notify counsel and/or parties that the pleadings are being held and will not be filed until the required filing fee is received or order allowing filing in forma pauperis. When said filing fee or order is received, the clerk shall file said pleadings nunc pro tunc as of the date they were received.

[18]

Rule 120

PRESENCE OF COUNSEL DURING TRIALS

121.1 Duty Of Counsel. In all jury cases it shall be the duty of counsel to be present at all portions and phases of trial including the time during which the jury is considering its verdict unless excused by the Court. It shall not be the duty of the Court or court officials to telephone or notify counsel after the jury has retired to consider the verdict.

121.2 Presumed Present. Unless the contrary affirmatively appears of record, it will be presumed that the parties and their counsel were present at all stages of the trial, or if absent, that their absence was voluntary and constituted a waiver of their presence.

Rule 130

DISMISSAL OF CIVIL CASES

131.1 For Want Of Prosecution. In these instances, and in other instances provided by law or court rules, the Court may, with or without notice to the parties, dismiss any case other than a criminal case for want of prosecution:

131.11 When plaintiff shall in any case for more than sixty days after filing suit willfully fail or refuse to have defendants, or some of them, served with process within the time permitted by law, or shall willfully fail or refuse to make ready the case, or cause same to be made ready, to be placed on the trial calendar.

131.12 If plaintiff or his attorney shall, after notice, fail or refuse to appear at the time and place fixed for pretrial, or other hearing, or trial in a case, or fail or refuse to obey a lawful order of the Court in the case.

131.13 Where a case has been pending in this Court for more than six months without any substantial proceedings of record having been taken therein during such time, as shown by record docket, or other manner.

Rule 140

REMMITTITURS

141.1 Civil Cases. Upon receipt of a remittitur from the appellate court in civil cases, when the judgment of this Court has

* * *

No. 78-48

In the Supreme Court of the United States

OCTOBER TERM, 1978

STANLEY SPIEGEL, PETITIONER

v.

CHARLES A. MOYE, JR., JUDGE,
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-48

STANLEY SPIEGEL, PETITIONER

v.

CHARLES A. MOYE, JR., JUDGE,
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that he is entitled to a writ of mandamus or prohibition overturning the district court's reconsideration of an order granting him a new trial.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of 30 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to six and one-half years' imprisonment, to be followed by five years' probation. His direct appeal is pending before the United States Court of Appeals for the Fifth Circuit.

Petitioner's trial was completed in August 1974. He filed a timely motion for a new trial and, on June 11, 1976, shortly after trial transcripts were completed, an amended motion with supporting brief (Pet. App. A-24, A-29, A-30). On April 13, 1977, the district court granted

petitioner a new trial on the ground that reversible error had occurred when the court permitted the defendants to waive a twelve-juror verdict by written stipulation of counsel after one juror was discharged because of illness, and that the effect of this error was enhanced by another error, subsequently identified as the giving of a jury instruction similar to the one condemned in *Mann* v. *United States*, 319 F. 2d 404 (C.A. 5), certiorari denied, 375 U.S. 986 (Pet. App. A-40, A-170 to A-171). The government moved for reconsideration of the new trial order on April 20, 1977, and on October 26, 1977, the district court vacated its order granting a new trial (Pet. App. A-170 to A-171).[1] After further delays at petitioner's request, he was sentenced in February 1978. Although his direct appeal was pending, petitioner filed a petition for a writ of mandamus and/or prohibition in the court of appeals on April 10, 1978, which was denied on June 6, 1978 (Pet. App. A-4).

It is not entirely clear whether petitioner is seeking review of that denial or is asking this Court to issue a similar writ. In either event, the extraordinary remedy of mandamus would not be the proper vehicle by which to test the propriety of the district court's reconsideration of its new trial order, since petitioner's claims in that regard can be raised in his pending appeal. See *Will* v. *United States*, 389 U.S. 90; *Parr* v. *United States*, 351 U.S. 513. See also *Kerr* v. *United States District Court*, 426 U.S. 394, 402-403. Accordingly, further review of the decision of the court below is not warranted.[2]

[1]The district court was initially of the opinion that the Fifth Circuit's decision in *United States* v. *Chiantese*, 546 F. 2d 135, would mandate reversal of any conviction based on the verdict of a jury given the *Mann* instruction. However, on rehearing *en banc* in *Chiantese*, the Fifth Circuit made its rule against use of the *Mann* instruction prospective only (560 F. 2d 1244, 1256); accordingly, the district court found it unnecessary to order a new trial on that ground (Pet. App. A-170 to A-171). The court also concluded on reconsideration (Pet. App. A-171) that its acceptance of defense counsel's written waiver of defendants' statutory right to a jury of twelve was not error.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

[2]Petitioner's claim that the district court lacked power to reconsider the new trial order is, in any event, without merit. He cites no authority supporting the proposition (Pet. 19-27) that a trial court lacks jurisdiction to vacate an interlocutory order granting a new trial before jeopardy attaches in the second trial; and dictum in *United States* v. *Spinella*, 506 F. 2d 426, 431 (C.A. 5), certiorari denied, 423 U.S. 917, a case on which petitioner relies, is to the contrary. *United States* v. *Smith*, 331 U.S. 469, relied on by petitioner (Pet. 24-25), is inapposite, holding only that a district court judge is without power to reverse, *sua sponte*, his order denying a new trial after the defendant's conviction has been affirmed on appeal. Similarly groundless is petitioner's contention (Pet. 27-32) that the government's failure to comply with a local court rule applicable to the filing of its motion for reconsideration of the new trial order deprived the district court of jurisdiction to consider the government's motion. It is settled that a court's application of its local rules is a discretionary matter and that failure to insist on full compliance with a rule does not deprive the court of jurisdiction over a matter. *Schacht* v. *United States*, 398 U.S. 58, 64.

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